IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CITY OF EL CENIZO, et al., *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants*.	No. 5:17-cv-404-OG [Lead Case]
EL PASO COUNTY, et al., *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants*.	No. 5:17-cv-459-OG [Consolidated Case]
CITY OF SAN ANTONIO, et al., *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants*.	No. 5:17-cv-489-OG [Consolidated Case] **DEFENDANTS' RESPONSE TO APPLICATIONS FOR PRELIMINARY INJUNCTION**

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RESPONSE TO MOTIONS FOR PRELIMINARY INJUNCTION

Defendants file this response to the motions for a preliminary injunction.[1] Because movants have not made the showings required for that relief, the motions should be denied.

INTRODUCTION

The Texas Legislature passed Senate Bill 4 ("SB4") for the purpose of improving the co-operation between the State and its localities with the federal government in aiding the federal government with enforcing existing federal immigration laws. SB4 is thus consonant with immigration policy set by Congress: "Consultation between federal and state officials is an important feature of the immigration system." *Arizona v. United States*, 567 U.S. 387, 411 (2012).

SB4 does two main things. First, SB4's anti-sanctuary provisions prohibit the State and localities from categorically banning officials from inquiring about immigration status. Notably, this does *not* require officials to take any specific action. Rather, it displaces policies that *never* permit officials to ask about immigration status. SB thus allows—not requires—officers to voluntarily ask about immigration status in proper circumstances. Consequently, SB4 does not go even as far as the state law *upheld* by the Supreme Court in *Arizona v. United States*, which "*requires*" officials to ask about "immigration status" if they have "reasonable suspicion" to believe someone was "unlawfully present." 567 U.S. at 411 (emphasis added). The Court held that this law requiring officials to ask about immigration status was not preempted, as Congress "has encouraged the

[1] "El Cenizo Mot." cites the Memorandum in Support of Plaintiffs' Application for Preliminary Injunction, ECF No. 24-1, in No. 5:17-cv-00404. "El Paso Mot." cites the Memorandum in Support of Plaintiffs El Paso County, et al.'s Application for Preliminary Injunction, ECF No.56-1, in No. 5:17-cv-00404. "San Antonio Mot." cites the Memorandum of Law in Support of Application for Preliminary Injunction by City of San Antonio, Texas, Rey A. Saldana, Texas Association of Chicanos in Higher Education, La Union del Pueblo Entero, and Workers Defense Project, ECF No. 77, in No. 5:17-cv-00404. "Austin Mot." cites the City of Austin's Opposed Motion for Preliminary Injunction, ECF No. 57, in No. 5:17-cv-00404. "Travis County Mot." cites the Plaintiff-Intervenors Travis County, Travis County Judge Sarah Eckhardt and Travis County Sheriff Sally Hernandez's Application for Preliminary Injunction, ECF No. 58, in No. 5:17-cv-00404.

sharing of information about possible immigration violations." *Id.* at 412. If Arizona's law *requiring* officials to ask about immigration status is not preempted, then Texas's law merely allowing and not requiring officials to ask about immigration status cannot be preempted.

Second, SB4 requires the State and localities to comply with "ICE detainers"—requests from the federal government to detain those already in custody for a brief additional time so that they can be transferred into federal custody. Importantly, current federal policy requires all ICE detainers to be accompanied by a warrant issued by a federal immigration official, certifying that the federal government has probable cause to believe that the person in question is unlawfully present. *See infra* pp. 48-49. Thus, in honoring federal ICE detainer requests, the State and its localities are *not* engaging in "unilateral state action to detain." *Arizona*, 567 U.S. at 410. Rather, the State and localities rely directly on the federal government's expressed interest in detaining the person in federal custody, the federal government's representation of probable cause, and on the federal government's interpretation of federal immigration classifications. Especially in light of the federal government's express representation of probable cause, there is no Fourth Amendment violation when States and localities honor ICE detainers. But even if there could be a Fourth Amendment violation as applied to a particular individual, that discrete scenario could not possibly justify a finding of facial invalidity—which requires a showing that SB4's ICE-detainer provision is unconstitutional in *all* applications.

There is an ongoing debate in our country about whether federal immigration statutes should be amended. Plaintiffs' claims largely track those overarching policy disputes. But such policy disagreements must be resolved by Congress. A judicial finding that enforcement of federal immigration policy is somehow motivated by a racially discriminatory purpose, or is an unconstitutional Fourth Amendment seizure, would jeopardize countless federal immigration laws. Here, Texas took the moderate step of ensuring that its state and local officials were permitted—but not required—to inquire about immigration status in appropriate circumstances, and were required to honor federal immigration detainer requests. This is lawful and does not conflict with federal law.

STATUTORY BACKGROUND

In recent years, some local officials in Texas have adopted policies that prohibit local law-enforcement officers from cooperating with the federal government when it seeks to enforce federal immigration law. For instance, some local officials direct officers not to honor requests to detain aliens briefly for transfer to federal immigration authorities, even for convicted criminals.[2] Travis County is one example, as described by Travis County Sally Hernandez:

> The Travis County Sheriff's Office will not "conduct or initiate any immigration status investigation" into those in custody. The Travis County Sheriff's Office prohibits the use of county resources to communicate with ICE about an "inmate's release date, incarceration status, or court dates, unless ICE presents a judicial warrant or court order." Absent such a warrant or order, ICE will not be allowed to conduct "civil immigration status investigations at the jail or [Travis County Sheriff's Office]." Further "no [Travis County Sheriff's Office] personnel in the jail, on patrol, or elsewhere may inquire about a person's immigration status."[3]

Policies like that one result in criminals being released rather than turned over to federal authorities, a result that promotes certain localities as sanctuaries from federal immigration law.

Because one of this Nation's most prized ideals is the rule of law, not the defiance of it, the State exercised its prerogative to control local governments and law enforcement officials. The result is SB4, set to take effect September 1, 2017. Act of May 3, 2017, 85th Leg., R.S. By ending local policies that block the federal government's ability to enforce immigration law, SB4 aims to ensure that suspected and convicted criminals are not released back onto the streets and that the respect for the rule of law continues as a beacon of safety and prosperity throughout the State.

A. SB4 does not broadly require local-level enforcement activities, but rather bans categorical interference with immigration-law enforcement.

Plaintiffs misrepresent SB4 as requiring "[u]nregulated local enforcement" of or "[u]nlimited local participation" in the enforcement of immigration law. El Cenizo Mot. 6. Except for a

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[2] *See, e.g.*, U.S. ICE, Weekly Declined Detainer Outcome Report for Jan. 28-Feb. 3, 2017, at 9-20, 23, https://www.ice.gov/doclib/ddor/ddor2017_01-28to02-03.pdf.

[3] Travis County Sheriff's Office, ICE Policy Video, at http://www.tcsheriff.org/inmate-jail-info/ice-video (last visited June 16, 2017); ECF No. 58-1 (Hernandez Decl.) ¶¶ 26, 48.

few provisions about the transfer of aliens from local or state custody to federal immigration custody, *see infra* pp. 6-7, SB4 does not require affirmative conduct from law-enforcement officers or agencies. Peace officers' law-enforcement functions are virtually untouched by SB4.

SB4 does not require peace officers to initiate immigration interrogations or arrests. *Cf.* El Cenizo Mot. 17. Instead, SB4 *prohibits* local policies that categorically ban cooperation in immigration-law enforcement. Specifically, new Texas Government Code § 752.053 contains general prohibitions in subsection (a) followed by concrete examples of prohibited acts in subsection (b):

> § 752.053. Policies and Actions Regarding Immigration Enforcement.
>
> (a) A local entity or campus police department may not:
>
> (1) adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws;
>
> (2) as demonstrated by pattern or practice, prohibit or materially limit the enforcement of immigration laws; or
>
> (3) for an entity that is a law enforcement agency or for a department, as demonstrated by pattern or practice, intentionally violate Article 2.251, Code of Criminal Procedure.
>
> (b) In compliance with Subsection (a), a local entity or campus police department may not prohibit or materially limit a person who is a commissioned peace officer [or other specific official] and who is employed by or otherwise under the direction or control of the entity or department from doing any of the following:
>
> (1) inquiring into the immigration status of a person under a lawful detention or under arrest;
>
> (2) with respect to information relating to the immigration status, lawful or unlawful, of any person under a lawful detention or under arrest, including information regarding the person 's place of birth:
>
> (A) sending the information to or requesting or receiving the information from United States Citizenship and Immigration Services, United States Immigration and Customs Enforcement, or another relevant federal agency;
>
> (B) maintaining the information; or
>
> (C) exchanging the information with another local entity or campus police department or a federal or state governmental entity;
>
> (3) assisting or cooperating with a federal immigration officer as reasonable or necessary, including providing enforcement assistance; or
>
> (4) permitting a federal immigration officer to enter and conduct enforcement activities at a jail to enforce federal immigration laws.

SB4 § 1.01 (§ 752.053). As shown, subsections (a)(1) and (2) establish a general ban on policies and practices that prohibit or materially limit the enforcement of immigration laws—the sort of

sanctuary-city policies prompting SB4. Subsections (b)(1) through (4) then provide four concrete examples of actions that a regulated entity may not take.

First, under subsection (b)(1), a regulated entity may not prohibit or limit its officers from inquiring into the immigration status of a person under arrest or under detention "for the investigation of a criminal offense," excluding detention solely because an individual "is a victim of or witness to a criminal offense" or "is reporting a criminal offense." *Id.* (§ 752.051(4)). This is a ban on local-level policies blocking immigration-status questioning. Contrary to plaintiffs' hyperbole, SB4 does not require police to demand that everyone they encounter "show papers" to prove their citizenship or immigration status. *Cf.* El Cenizo Mot. 4; San Antonio Mot. 18. Likewise, SB4 does not require "asking every single motorist about their immigration status." El Cenizo Mot. 2, 16. Nor does SB4 "authorize[] individual police officers to conduct investigations of immigration status." Austin Mot. 9. SB4 merely establishes that, during an arrest or lawful criminal detention, police cannot be *blocked* from gathering information regarding immigration status.

Subsection (b)(2) then bans covered entities from prohibiting or limiting their officers from collecting and sharing important immigration-status information, such as place of birth, with other law-enforcement agencies. Again, this is not some sort of requirement that officers must ask each person they encounter to "show papers." Rather, this protects the free flow of information between law-enforcement agencies.

Lastly, under subsections (b)(3) and (4), covered entities may not block their officers from assisting or cooperating with a federal immigration officer as reasonable or necessary, including allowing federal officers to enter and conduct enforcement activities at a local jail. An exception is made for assistance at places of worship. SB4 § 1.01 (§ 752.053(c)). Federal immigration officials thus cannot be singled out by local officials for categorical exclusion from cooperation efforts. But SB4 does not require that local officers join federal immigration-enforcement task forces or preclude busy local officers from turning down such federal requests to join enforcement task forces. *Cf.* El Cenizo Mot. 8.

B. SB4 requires affirmative cooperation from peace officers in two ways.

SB4 does require affirmative cooperation from law enforcement in two main respects: assistance with federal immigration arrest authority pursuant to detainer requests made by the federal government, and ensuring that offenders completing their sentences in the custody of the Texas Department of Criminal Justice or a county jail are turned over to federal custody when subject to an immigration detainer request from the federal government.[4]

1. First, SB4 obligates covered agencies to fulfill requests by U.S. Customs & Immigration Enforcement to detain aliens for federal arrest ("ICE detainers"):

> A law enforcement agency that has custody of a person subject to an immigration detainer request issued by United States Immigration and Customs Enforcement shall: (1) comply with, honor, and fulfill any request made in the detainer request provided by the federal government; and (2) inform the person that the person is being held pursuant to an immigration detainer request issued by United States Immigration and Customs Enforcement.

SB4 § 2.01 (art. 2.251(a)); *see id.* § 1.01 (§ 752.053(a)(3)) (banning local prohibitions on compliance with immigration detainers); *id.* § 1.01 (§ 772.0073(a)(2)) (defining immigration detainer as a federal request to a local entity to keep temporary custody of an alien, including on a U.S. Department of Homeland Security Form I-247 document or a similar or successor form). The Austin plaintiffs misrepresent that SB4 inevitably results in "extended detention for purposes of communication with ICE." Austin Mot. 9. To the contrary, SB4 does not require investigatory detentions to determine whether an alien is subject to an immigration detainer request (Austin Mot. 9), but instead triggers compliance duties when a detainer request has in fact been "*provided by* the federal government." SB4 § 2.01 (art. 2.251(a)).

SB4 contains an exception to this rule: A law-enforcement agency is not required to comply with an ICE detainer if the person in custody demonstrates his or her United States citizenship or

[4] SB4 also amends certain surety-bond provisions in the Texas Code of Criminal Procedure so that a surety is not relieved if an accused "is in federal custody to determine whether the accused is lawfully present in the United States." SB4 § 4.01 (amending Tex. Code Crim. Proc. art. 17.16).

lawful immigration status through government-issued identification such as a Texas driver's license. *Id.* § 2.01 (art. 2.251(b)). SB4 thus directs that, if the subject of the detainer "has provided proof" of lawful immigration status, compliance with the ICE detainer request is not required. SB4 § 2.01 (art. 2.251(b)). Officials therefore can accept, for example, a Texas driver's license as proof of lawful status—without having to make an independent determination, as a matter of federal immigration law, whether the individual has violated the terms of that status or is otherwise "present in the United States in violation of [federal law]" and therefore removable. 8 U.S.C. § 1227(a)(1)(B).

2. Second, if the subject of an ICE detainer is serving a sentence in a Texas correctional facility, SB4 requires that person to be transferred to federal custody to serve the final seven days of the sentence "following the facility's . . . determination that the change in the place of confinement will facilitate the seamless transfer of the defendant into federal custody." *Id.* § 2.02 (art. 42.039(a)-(b)). If a sentenced defendant is under an ICE detainer, a trial judge must order such a transfer either during sentencing or when detainer information becomes available. *Id.* (art. 42.039(b)). These transfer provisions, however, apply "only if appropriate officers of the federal government consent to the transfer of the defendant into federal custody under the circumstances described by this subsection." *Id.*

C. SB4 enacts important law-enforcement limits.

While removing obstacles to cooperating with federal officials, SB4 also limits state officials' conduct in important ways. SB4 strictly *prohibits* unconstitutional discrimination in the immigration-enforcement context:

> [A regulated entity under SB4] may not consider race, color, religion, language, or national origin while enforcing immigration laws except to the extent permitted by the United States Constitution or Texas Constitutions.

Id. § 1.01 (§ 752.054). Plaintiffs are thus wrong that SB4 defines police conduct "that may never be limited." *Cf.* El Cenizo Mot. 10. Unlawful discrimination is squarely prohibited by SB4.

And preexisting Texas law already bans racial profiling. Tex. Code Crim. Proc. art. 2.131 ("A peace officer may not engage in racial profiling."); *id.* art. 2.132(b) ("Each law enforcement agency in this state shall adopt a detailed written policy on racial profiling. The policy must . . . strictly prohibit peace officers employed by the agency from engaging in racial profiling."); *see, e.g.*, Decl. of Sheriff Bill Waybourn (Exh. 2) ¶ 13 ("My Office has a policy prohibiting racial profiling that complies with Article 2.132"); Decl. of Steven McCraw (Exh. 1) ¶ 9 ("The Department has a zero-tolerance policy regarding racial profiling.").

SB4 also offers protections for crime victims and witnesses. It permits police investigating a crime to ask about a victim's or witness's immigration status *only* if necessary to investigate the crime or provide the victim or witness with information about federal visas designed to protect individuals who assist law enforcement. SB4 § 6.01 (art. 2.13(d)). If a victim or witness is himself suspected of a criminal offense, the officer may of course inquire into his or her nationality or immigration status. *Id.* (art. 2.13(e)). The import of these provisions is not, as plaintiffs state (El Cenizo Mot. 10 n.3), that officers may "ask about immigration status to provide information about visas." SB4 expressly limits visa-based interactions to a narrow class of visas for *assisting* law enforcement. And SB4 expressly permits local outreach to educate communities about these limits on immigration inquiries. SB4 § 1.01 (§ 752.057(a)-(b)). Indeed, any such outreach program must include outreach to victims of family violence and sexual assault. *Id.* (§ 752.057(b)).

D. SB4 is enforced through penalties and removal from office.

SB4 creates a number of consequences for agencies and officials who disregard their state-law responsibilities and obstruct federal immigration-enforcement efforts.

The first potential consequence is an injunction and monetary penalty. A person residing within the jurisdiction of the local law-enforcement agency may file a complaint about that agency with the Attorney General of Texas, who may seek equitable relief in court against that agency to compel compliance. *Id.* § 1.01 (§ 752.055(a)-(b)). The agency is also subject to a civil penalty. *Id.*

(§ 752.056(a)) (penalty of $1,000-$1,500 for first violation, and $25,000-$25,500 for subsequent violations). These civil penalties are deposited into a fund for crime victims. *Id.* (§ 752.056(d)).

A second potential consequence is removal from office. SB4 states that "a person holding an elective or appointive office of a political subdivision of this state does an act that causes the forfeiture of the person's office if the person violates Section 752.053," which is the ban on local obstruction of immigration law enforcement. *Id.* (§ 752.0565(a)). The Texas Attorney General may petition for removal upon "probable grounds that the public officer" categorically prohibited officers or employees from inquiring into a person's immigration status when that person is under lawful detention or arrest; from maintaining information about a person's immigration status or sharing it with law-enforcement authorities; from cooperating with federal immigration officers; or from allowing federal immigration officers to enter and conduct enforcement activities within jails. *Id.* (§ 752.0565(b)). Upon an adverse finding, a court must enter judgment removing the person from office. *Id.* (§ 752.0565(c)).

Lastly, certain officials' failure to comply with SB4's detainer provisions is a misdemeanor offense. *Id.* § 5.02 (§ 39.07(a)-(c)). This is a "misdemeanor involving official misconduct," *id.* § 5.01 (§ 87.031(c)), which under existing state law "operates as an immediate removal from office of that officer" upon conviction. Tex. Local Gov't Code § 87.031(a).[5] SB4 also creates civil liability for a law-enforcement agency or department that, as demonstrated by pattern or practice, "intentionally violate[s]" SB4's duty regarding detainer requests. SB4 § 1.01 (§ 752.053(a)(3)). SB4 does not attach criminal consequences to any other failure to participate in immigration-law enforcement.

[5] The Texas Attorney General is authorized to defend a local entity in any action before any court if the entity requests the Attorney General's assistance and the "cause of action arises out of a claim involving the local entity's good-faith compliance with an immigration detainer request." SB4 § 3.01 (§ 402.0241(b)). The State is "liable for the expenses, costs, judgment, or settlement of the claims arising out of the representation." *Id.* (§ 402.0241(c)). SB4 also creates a grant program for local law-enforcement entities to offset costs related to fulfilling immigration-detainer requests, or for otherwise enforcing immigration laws. *Id.* § 1.02 (§ 772.0073).

ARGUMENT

Plaintiffs are not entitled to a preliminary injunction, which requires them to show their likely success in the lawsuit and that three equitable factors warrant an injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

I. Defendants' Objections to Venue Require Resolution at the Outset.

As a threshold matter, a preliminary injunction cannot issue without overcoming properly raised venue objections. *Hendricks v. Bank of Am., N.A.*, 408 F.3d 1127, 1135 (9th Cir. 2005) ("Because Mutual's [venue and personal jurisdiction] defenses were properly raised, and because they attacked the district court's authority to grant relief, the district court had to consider the defenses as a logical predicate to its preliminary injunction order.") (quotation marks omitted). Defendants have objected to improper venue, *see El Cenizo* ECF Nos. 14-1; 32-1; *El Paso* ECF No. 5-1, and those objections therefore require resolution before any injunctive relief could possibly be issued. *Hendricks*, 408 F.3d at 1135. In all events, plaintiffs do not show a likelihood of success on the merits or equitable entitlement to a preliminary injunction.

II. SB4 Is Not Preempted by Federal Law.

SB4 is not preempted because it is not in conflict with federal immigration law, and federal law does not field-preempt SB4. *Cf.* El Cenizo Mot. 13-19; San Antonio Mot. 32-37; Austin Mot. 10 (joining El Cenizo's preemption arguments); El Paso Mot. 4 n.1 (same); Travis County Mot. 1 (same). Rather, SB4 is fully consonant with federal immigration statutes evincing a policy in favor of States sharing immigration-related information with the federal government. *See* 8 U.S.C. §§ 1373, 1644. As the Supreme Court recently made clear, "[c]onsultation between federal and state officials is an important feature of the immigration system." *Arizona*, 567 U.S. at 411. Far from usurping federal immigration power, SB4 promotes it by encouraging greater cooperation between state and local officials and the federal government.

A. SB4's anti-sanctuary provisions do not conflict with the federal scheme for cooperative immigration enforcement.

Preemption analysis begins "'with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). An express preemption clause will manifest that purpose. But the Supreme Court has admonished that "[i]mplied preemption analysis does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'" *Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment). To do so "would undercut the principle that it is Congress rather than the courts that preempts state law." *Id.* The touchstones for conflict preemption are whether the state law would make compliance with federal law a "physical impossibility" or if the state law would present an "obstacle" to federal law. *Arizona*, 567 U.S. at 399-400. SB4 does neither.

1. As an initial matter, and as Plaintiffs tacitly recognize, the "physical impossibility" test for conflict preemption is not met. Law-enforcement agencies can easily comply with SB4 and federal immigration law simply by not prohibiting their officers from cooperating with federal immigration officials. Doing so would satisfy both SB4 § 1.01 (§ 752.053) and 8 U.S.C. § 1373.

2. SB4 also does not meet the obstacle-preemption test: SB4 does not impliedly conflicting with federal immigration law by impeding the achievement of federal immigration objectives. *Contra* El Cenizo Mot. 13-15; San Antonio Mot. 35-37. SB4 does not "stand[] as an obstacle to the accomplishment and execution of the full purposes or objectives of Congress." *Gade*, 505 U.S. at 98 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). It does just the opposite. SB4 furthers Congress's goal of encouraging local law-enforcement agencies to cooperate with federal immigration officials. It does so by prohibiting local law-enforcement agencies from having policies categorically prohibiting or limiting their officers or employees from inquiring into a detained individual's immigration status and from sharing that information with federal officials. *See* SB4

§ 1.01 (§ 752.053). Federal immigration law promotes just that type of cooperative arrangement between localities and federal immigration officials. *See* 8 U.S.C. §§ 1373(a), (b), 1644 (encouraging state and local law enforcement agencies to communicate with federal immigration officials regarding the unauthorized presence of aliens).

a. Preemption is a question of congressional purpose. *Medtronic*, 518 U.S. at 485. Here, far from acting to preempt state involvement in the effort to cooperate with federal immigration officials, Congress has broadly encouraged it. As the Supreme Court recognized in *Arizona*, "[c]onsultation between federal and state officials is an important feature of the immigration system." 567 U.S. at 411. And Congress has "done nothing to suggest it is inappropriate to communicate with ICE." *Id.* at 412; *see id.* (holding that "[t]he federal scheme . . . leaves room for a policy requiring state officials to contact ICE as a routine matter."). To the contrary, Congress actively "encourage[s] the sharing of information about possible immigration violations." *Id.* (citing 8 U.S.C. § 1357(g)(10)(A)).

The text of 8 U.S.C. §§ 1373 and 1644 state Congress's goal of facilitating cooperation between law enforcement and federal immigration officials. *See generally* 8 U.S.C. §§ 1373, 1644 (encouraging local communication with federal immigration authorities regarding unlawfully present aliens). To promote this cooperation, Congress requires federal immigration authorities to respond to state and local inquiries seeking to "verify or ascertain the citizenship or immigration status of any individual." 8 U.S.C. § 1373(c). Similarly, § 1357(g)(10) expressly contemplates the States' inherent authority to cooperate with the federal government in enforcing immigration laws. *See* 8 U.S.C. § 1357(g)(10) (formal agreement between federal government and state or locality is not necessary for state or locality to "communicate" or "cooperate" with the U.S. Attorney General's enforcement of immigration laws); *see, e.g.*, *United States v. Di Re*, 332 U.S. 581, 589 (1948) (authority of state officers to make arrests for federal crimes is, absent federal statutory instruction, a matter of state law); *Gonzales v. City of Peoria*, 722 F.2d 468, 475-76 (9th Cir. 1983) (concluding that Arizona officers have authority to enforce the criminal provisions of federal immigration law),

overruled on other grounds in Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999), *cited in Arizona*, 567 U.S. at 413-14.

Congress's encouragement of state and local cooperation has gone beyond mere words. It has appropriated funds for state and local governments to assist in enforcing immigration laws. *E.g.*, 8 U.S.C. § 1103(a)(11) (authorizing payments and cooperative agreements to cover local costs for the provision of facilities, supplies, medical care, and security related to the administrative detention of illegal immigrants in non-federal facilities); *see Arizona*, 567 U.S. at 408, 411-12 (discussing these and other provisions confirming that "[c]onsultation between federal and state officials is an important feature of the immigration system").

The legislative history of 8 U.S.C. §§ 1373 and 1644 provide yet further support that SB4 would be a boon, not an obstacle, to Congress's goal of the States' law-enforcement officials at all levels working cooperatively with federal immigration authorities. In passing 8 U.S.C. § 1373, Congress recognized that "[e]ffective immigration law enforcement requires a cooperative effort between all levels of government." S. Rep. No. 104-249, at 19 (1996) (Cmte. Rep.). Such cooperation promotes rather than detracts from the federal government's ability to enforce immigration laws. After all, "[t]he acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act." *Id.* at 19-20. Section 1644, passed by the same Congress as section 1373, was enacted for similar reasons: "to give State and local officials the authority to communicate with the INS regarding the presence, whereabouts, or activities of illegal aliens." H.R. Rep. No. 104-725, at 383 (1996) (Conf. Rep.).

More broadly, SB4 promotes the aims of federal immigration law as a whole. As the Second Circuit observed in the context of rejecting a Tenth Amendment commandeering challenge to 8 U.S.C. § 1373, the successful implementation of a complex federal program like immigration enforcement necessarily depends on "informed, extensive, and cooperative interaction" between federal, state, and local officials. *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999).

Without that cooperation, "federal programs may fail or fall short of their goals." *Id.* In fact, what poses a conflict with federal law are the very policies that SB4 aims to prevent—local law-enforcement policies blocking the gathering and sharing with federal officials of immigration information. What would "frustrate[the] federal program[]," *id.*, is not SB4 but, rather, allowing "localities to engage in passive resistance" to the goals of federal immigration law. *Id.*

b. In promoting this type of cooperative arrangement, SB4 does not create its own classification of aliens or in any other way attempt to supplant the federal government's control of immigration policy and enforcement. SB4 "simply seeks to enforce" the cooperation between local law enforcement and federal immigration officials that federal law itself promotes, thus "trac[ing] the federal law" in all respects. *Whiting*, 563 U.S. at 602, 607. Federal immigration officials are the ones who will ultimately determine what steps to take (or not to take) to detain or remove any unlawfully present alien. There is no risk, then, of putting "local officials in the impermissible position of arresting and detaining persons based on their immigration status without federal direction and supervision." *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524, 532 (5th Cir. 2013) (en banc) (plurality op.).

In this way, SB4 differs significantly from the ordinance held preempted in *Farmers Branch*. There, "[b]ased on a classification that does not exist in federal law," the city "criminalized the occupancy of rental housing by those non-citizens found to be 'not lawfully present.'" *Id.* at 534 (quoting Ordinance 2952 §§ 1(C)(1), 3(C)(3)). The Fifth Circuit held that the ordinance effectively provided local officers the authority to criminalize what the local officers unilaterally determined in their minds to be unlawful presence. *Id.* ("The Ordinance allows for local authorities to prosecute as well as arrest based on perceived unlawful presence."). In sharp contrast, SB4 does not classify, criminalize, or in any other way regulate aliens. Nor does it authorize freestanding authority to arrest for civil immigration violations. It merely ensures that state and local officials can cooperate with federal immigration officials. *See generally* SB4; *see also infra* pp. 3-7.

When, as here, the challenged state law is not an obstacle to the federal government's stated goals, but actually furthers them, finding implied preemption would be quite inappropriate. *See,*

e.g., *Wyeth v. Levine*, 555 U.S. 555, 578-79 (2009) (holding that a state law mandating drug warnings was not preempted in part because it furthered the federal regulatory goal of providing information to patients about the potential dangers of prescription drugs); *Midatlantic Nat'l Bank v. N.J. Dep't of Envt'l Protection*, 474 U.S. 489, 505 (1986) (holding that a state law was not preempted because it furthered the federal "goal of protecting the environment against pollution").

c. In an attempt to fashion a conflict where one does not exist, plaintiffs contend that SB4 would upend "the careful balance Congress has struck between encouraging local assistance and preserving local discretion" in cooperating with federal immigration officials. El Cenizo Mot. 13; *see also* El Cenizo Mot. 14 (describing immigration statutes that encourage voluntary cooperation between local law enforcement agencies and federal immigration officials); *accord* San Antonio Mot. 35. But Congress struck no such balance, and plaintiffs erroneously imply that there was a middle ground that Congress could have possibly struck. In reality, Congress could not have legislated a "compulsory local role" (El Cenizo Mot. 19) in federal immigration enforcement, because that would be unconstitutional commandeering under the Tenth Amendment. *See Printz v. United States*, 521 U.S. 898, 935 (1997). Thus, Congress's decision to encourage voluntary local cooperation could not possibly have preempted State-enacted policies regulating—or even requiring—local cooperation.

Moreover, plaintiffs' argument is foreclosed by *Arizona v. United States*. The Supreme Court in *Arizona* upheld a state law that *required* officials to ask about immigration status if they had reasonable suspicion of unlawful presence. 567 U.S. at 411-15. And that Arizona law had its own state penalty provisions. *See* S.B. 1070, § 2 (Ariz. Rev. Stat. Ann. § 11-1051(H)) ("[A]ny official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws" is subject to civil penalties of up to $5000 per day.").

By prohibiting localities from having policies that hinder information sharing with federal officials, *see* 8 U.S.C. §§ 1373, 1644, Congress went right up to the line of what it could do without running afoul of the Tenth Amendment's anti-commandeering doctrine. Indeed, Sections 1373 and

1644 were themselves subject to Tenth Amendment facial challenges from New York City officials. *See generally City of New York*, 179 F.3d 29. The Second Circuit ultimately upheld these federal statutes because they did "not directly compel states or localities to require or prohibit anything" but, rather, "prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the INS." *Id.* at 35; *see also id.* at 36 (noting that, by contrast, an as-applied challenge to a federal immigration-gathering requirement would raise "not insubstantial" commandeering concerns).[6]

Congress cannot compel state or local governments to enact or administer a federal regulatory program. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 175-76 (1992) (holding that Congress cannot command state governments to provide for the disposal of nuclear waste within their borders pursuant to a federal regulatory program). Nor can Congress require local law enforcement agencies directly to perform federal immigration functions. *See, e.g.*, *Printz*, 521 U.S. at 935 (holding that Congress cannot compel local law enforcement officials to conduct background checks pursuant to a federal regulatory program).

Importantly, by contrast, States do not face similar constraints from the U.S. Constitution on their ability to direct localities or local enforcement officials, whose power is set at "the absolute discretion of the State." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). Plaintiffs go on at length about the supposedly unfettered power of localities to decide whether and to what extent they will cooperate with federal immigration authorities. *See* El Cenizo Mot. 13-14, 16-17; San Antonio Mot. 35-36. They suggest that any local government, or even a single local official, has the unfettered discretion either to cooperate with, or to frustrate, the uniform administration of federal immigration law. That would be an extraordinary assertion of control by localities that does not square with the structure of state government. *See Hunter*, 207 U.S. at 178; *accord, e.g.*, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (States have "extraordinarily wide latitude

[6] Defendants maintain that 8 U.S.C. §§ 1373 and 1644 do not unconstitutionally commandeer States. But if Defendants are wrong and these federal statutes are unconstitutional, then these statutes would be unlawful and thus could not preempt state laws like SB4—as these federal statutes would not be part of the "supreme Law of the Land." U.S. Const. art. VI, cl. 2.

. . . in creating various types of political subdivisions and conferring authority upon them."); *Williams v. Mayor*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges . . . under the Federal Constitution which it may invoke in opposition to the will of its creator."). Here, the Texas Legislature enacted a law that prohibits any local practice, codified or otherwise, restricting cooperation with federal immigration officials in several respects. As a result, any contrary local ordinance, policy, or practice that would be inconsistent with SB4—a general law enacted by the Texas Legislature—is null and void under Texas state law. *See BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, *8 (Tex. 2016) (holding that clear and unmistakable state legislation preempts local ordinances); *see also* Tex. Const. art. XI, § 1 (counties are "legal subdivisions of the State"); *id.* art. V, § 23 (sheriffs' "duties . . . shall be prescribed by the Legislature").[7]

d. Plaintiffs also claim that SB4 conflicts with federal immigration law because it "impose[s] different penalties than Congress has chosen" to employ in 8 U.S.C. § 1373. El Cenizo Mot. 15; San Antonio Mot. 35. SB4 does indeed provide civil (Tex. Gov't Code § 752.056(a)) and criminal (Tex. Penal Code § 39.07) penalties. It is inaccurate, however, to say that Congress "carefully calibrated the amount of pressure" (El Cenizo Mot. 13) to induce local participation in federal immigration enforcement efforts. Sections 1373 and 1644 merely state a federal directive, and Congress did not impose—or attempt to impose—any particular penalties or enforcement mechanisms under these federal statutes. Congress thus did not even enter the field of whether and how to penalize state or local officials who violated 8 U.S.C. §§ 1373 and 1644. And that makes perfect sense, as these statutes already test the limits of the Tenth Amendment anti-commandeering doctrine, and Congress could have rationally concluded that it wanted to leave to the States how to

[7] Some larger Texas cities, unlike El Cenizo, have "home-rule" status under the Texas Constitution that allows them to exercise self-governance. *Dallas Merchant's & Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993). But even these cities are subordinate to the State. *See id.* ("An ordinance of a home-rule city that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute."); *see also* Tex. Const. art. XI, § 5(a) ("[Ordinances] shall not contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.").

enforce these directives—especially when any penalties would be incurred by state or local officials.

It is not the case, then, that "two separate remedies are brought to bear on the same activity." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (quotations omitted). Congress did not even attempt to enter the field of what penalties were appropriate for States or state officials who block the sharing of immigration information with the federal government. Section 1373 prohibits such categorical local bans on information-sharing and thus would in theory allow injunctive relief against a state official to require compliance with federal law, if the State official enacted a policy categorically prohibiting immigration-related information sharing with the federal government. But Congress pointedly left any penalties for non-compliance up to the States. *See, e.g.*, *Hines*, 312 U.S. at 68 n.22 ("[W]here the Congress, while regulating related matters, has purposely left untouched a distinctive part of a subject which is peculiarly adapted to local regulation, the state may legislate concerning such local matters which Congress could have covered but did not."); *Whiting*, 563 U.S. at 606-07 (holding that a State could tailor specific sanctions for the violation of federal immigration laws under state licensing laws in the absence of congressional prohibition on those sanctions).

That makes good sense, as it respects the federal-state balance of power by allowing States to determine the degree of penalty to which their own officials should be subjected. There is a sound reason for Congress's decision to allow States to calibrate penalties for their own localities' failure to cooperate with federal immigration officials: States are not creatures of Congress, and States are not dependent on federal authorization to proscribe and provide penalties for conduct within their jurisdiction. *E.g.*, *Sturges v. Crowninshield*, 17 U.S. 122, 193 (1819). As part of Texas's independent sovereign right to protect the health, welfare, and safety of its residents, the State enacted SB4 to affirm its policy of cooperating with federal immigration authorities—a policy that is necessarily exercised through state and local law-enforcement agencies. *See, e.g.*, Tex. Const. arts. V, § 23; XI, § 1.

The State's ability to shape these sort of policies adopted by its political subdivisions, and regulate its own officials, is unquestionably an exercise of the State's traditional police powers. *See, e.g.*, *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) ("The promotion of safety of persons and property is unquestionably at the core of the State's police power."). The penalties at issue here, directed entirely at local law-enforcement agencies and their officials, strike at the heart of state power. *See Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) (observing that "federal legislation threatening to trench on the States' arrangements for conducting their own governments [is to] be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power"). And as the Supreme Court has explained, courts must assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565.

Even aside from federal-state comity, Congress could well have decided not to test the boundaries of the Tenth Amendment by creating federal penalties for localities' refusal to cooperate. For instance, there is litigation currently pending in the Northern District of California as to whether an Executive Order potentially authorizing the withholding of federal funds in order to encourage compliance with federal immigration laws constitutes unconstitutional coercion. *See Cty. of Santa Clara v. Trump*, No. 3:17-cv-00574 (N.D. Cal.). States, by contrast, do not have similar constraints on their power to direct recalcitrant localities. *See supra* pp. 16-17.

Nothing in the legislative history of §§ 1373 and 1644 suggests that Congress's failure to include penalties for these provisions somehow intended to *foreclose* the States from enacting their own penalties—which would regulate their own officials—through state legislation pursuing similar goals. *Compare, e.g.*, *Arizona*, 567 U.S. at 405 ("A commission established by Congress to study immigration policy and to make recommendations concluded these penalties [on aliens seeking unauthorized employment] would be 'unnecessary and unworkable.'"), *with Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489 (2008) (holding that regulated entities under the Clean Water Act could be liable for damages not expressly provided in the Act given the absence of "clear indication of congressional intent to occupy the entire field of pollution remedies").

The lack of any penalties in §§ 1373 and 1644 is significant evidence against preemption. There is no "careful framework" of federal sanctions with which the state sanctions could conflict. *Arizona*, 567 U.S. at 402. A principal concern when a federal law chooses *different* penalties than a parallel state law is that the latter might disrupt the enforcement priorities of the former. *See, e.g.*, *id.* at 402-03 (holding preempted Arizona's attempt to make the federal misdemeanor of failure to carry an alien registration document a separate state misdemeanor because "the State would have the power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies"). But there is no enforcement scheme in § 1373 to frustrate because there is no "broad and comprehensive" federal regulatory framework governing cooperation between state and local officials and federal immigration officials, complete with penalties subject to the federal government's enforcement priority and prosecutorial discretion. *Hines*, 312 U.S. at 69.

e. The City of Austin claims that SB4 "conflicts with Executive Branch policy" because SB4 applies more broadly than the definition given to "sanctuary jurisdiction" by the Department of Justice in recent litigation and in a policy memorandum from Attorney General Sessions. Austin Mot. 17. But, of course, executive-branch court filings and policy memos cannot preempt state law. Only congressional action can. "It is Congress—not the [Executive]—that has the power to pre-empt otherwise valid state laws." *North Dakota v. United States*, 495 U.S. 423, 442 (1990). "Executive branch communications" may "express federal policy" but they lack the "force of law." *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 329-30 (1994); *see also id.* (holding that "[e]xecutive branch actions [like] press releases, letters, and *amicus* briefs" are not law). The question for preemption purposes is only what "Congress has done" or delegated through statutes. *Arizona*, 567 U.S. at 412. And, here, Congress has not foreclosed Texas from encouraging its localities to cooperate with federal immigration enforcement efforts. *See supra* pp. 12-19.

At its base, Austin's argument about a conflict with executive branch policy seems to be nothing more than that SB4 goes further than section 1373. *See* Austin Mot. 18. But, as discussed

above, *see supra* pp. 15-16, far from evincing an intent to foreclose States from doing more to encourage cooperation with federal immigration officials, Congress had a good reason for stopping where it did with section 1373: It cannot compel state and local officials to administer or enforce a federal regulatory program. *Printz*, 521 U.S. at 935*; New York*, 505 U.S. at 175-76; *see also City of New York*, 179 F.3d at 35-36 (rejecting a Tenth Amendment challenge to section 1373 but noting that a federal immigration-gathering requirement would raise "not insubstantial" commandeering concerns). Similarly, section 1373 does not have sanctions that were "carefully-calibrated measures permitted by Congress and the Department of Justice" in a way that impliedly forecloses States from fashioning their own penalties to ensure local compliance. Austin Mot. 18. Congress did not attempt to impose any sanctions or enforcement mechanisms in section 1373. *See supra* pp. 15-18.

B. SB4's anti-sanctuary provisions are not field preempted by the federal scheme for cooperative immigration enforcement.

Plaintiffs suggest that the State has no power to promote cooperation with federal immigration authorities over matters on which Congress has not legislated. *See* El Cenizo Mot. 16-17; San Antonio 32-35. That theory is untenable. Nothing shows that it was Congress's "clear and manifest purpose," *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992), to preempt the field underlying SB4 by enacting a regulatory scheme "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," *Gade*, 505 U.S. at 98; *accord Arizona*, 567 U.S. at 399; *cf. Plyler v. Doe*, 457 U.S. 202, 228 n.23 (1982) ("Despite the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns.").

1. Plaintiffs point to several proposed bills that were ultimately not enacted where Congress considered taking additional steps to address sanctuary cities. El Cenizo Mot. 16. But it is "settled law" that "inaction by Congress cannot serve as justification for finding federal preemption of state law." *Graham v. R.J. Reynolds Tobacco Co.*, No. 13-14590, 2017 WL 2176488, *14

(11th Cir. May 18, 2017); *see also P.R. Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988) ("There is no federal pre-emption *in vacuo*, without a constitutional text or a federal statute to assert it."); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act."); *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999) ("[D]eductions from congressional inaction are notoriously unreliable.").

2. Nor does even extensive congressional action in a field like immigration evince an intent to preclude *any* state regulation. *Contra* San Antonio Mot. 34 n.62. In *DeCanas*, the Supreme Court observed that it "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised." *DeCanas v. Bica*, 424 U.S. 351, 355 (1976). This is all the more true for a law like SB4, which is not a "regulation of immigration" because it has nothing at all to say about "who should or should not be admitted into the country, and the conditions under which a legal entrant may remain" (*id.*). *See infra* pp. 23-26.

a. The City of San Antonio argues that section 1357(g) of the Immigration and Naturalization Act provides a "carefully constructed structure for cooperation with federal authorities," occupying the field of SB4. San Antonio Mot. 33. Through section 1357(g), States or their political subdivisions can formally enter into agreements with the federal government to have their officers enforce federal immigration law as de facto federal officers. 8 U.S.C. § 1357(g). But that provision merely provides *one* way for States and localities to cooperate with federal immigration officials, not the *only* way. That much is clear from section 1357 itself. The statute expresses Congress's clear intent that the scheme outlined in section 1357(g) does not preempt alternative forms of State and local cooperation with the federal immigration officials:

> Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State

> (A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or
>
> (B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.

Id. § 1357(g)(10). There is, thus, nothing to the argument that by setting up a formal process to allow State officials directly to enforce federal immigration law, Congress meant to preempt lesser means of cooperation. *Contra* San Antonio Mot. 33-34.

It is not enough that aliens can be thought of as a "subject" of the state statute. *DeCanas*, 424 U.S. at 355. SB4 does not in any way regulate alien conduct. It does not make it a crime for aliens to be present in the State. It does not criminalize or otherwise regulate aliens seeking employment. And it says nothing about arresting aliens for any immigration-related offense. Rather, SB4 is concerned with doing one thing: Ensuring that law-enforcement officials who are answerable to the State (*see* Tex. Const. arts. V, § 23; XI, § 1) do not prohibit line officers from voluntarily cooperating with the federal government in the enforcement of immigration laws. SB4 § 1.01 (§ 752.053).

Thus, SB4 differs markedly from the sort of state laws that have been held preempted for encroaching upon the federal government's immigration powers. For example, SB4 does not encroach upon a "broad and comprehensive plan describing the terms and conditions upon which aliens may enter this country, how they may acquire citizenship, and the manner in which they may be deported." *Hines*, 312 U.S. at 69 (holding preempted a state law requiring alien registration and card-carrying). Nor does the law attempt to set up its own de facto immigration system by "impos[ing] discriminatory burdens upon the entrance or residence of aliens." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418-19 (1948) (orig. proceeding) (holding preempted a state law that precluded lawful aliens from obtaining certain licenses).

b. SB4 is not at all like the statutory provisions the Supreme Court held were preempted in *Arizona v. United States*. *Cf.* El Cenizo Mot. 15-19; San Antonio Mot. 34-37. Unlike SB4, the Arizona law was aimed directly at aliens; its design was to "'discourage and deter the unlawful

entry and presence of aliens and economic activity by persons unlawfully present in the United States.'" *Arizona*, 567 U.S. at 393 (quoting Ariz. Rev. Stat. Ann. § 11-1051 note). More importantly, most of Arizona's regulations were at odds with federal immigration law and federal enforcement priorities. The state attempted an end-run around the federal government to promote the more aggressive enforcement of the nation's immigration laws. Here, Texas is about as far as conceivably possible from pursuing "policies that undermine federal law." *Id.* at 416. The point of SB4, after all, is not to erect some state-based immigration law alongside the federal system, but to foster better communication and cooperation with federal immigration officials in the *federal* enforcement of immigration law.

Section 3 of Arizona's statute made it a state offense to be unlawfully present in the United States and fail to register with the federal government. *Id*. at 400 (discussing Ariz. Rev. Stat. Ann. § 13-1509(A)). The Court held that Arizona was not free to create its own offense for failing to register because Congress had occupied the field of alien regulation. *Id.* at 401-02. The Court pointed to detailed federal regulation on the topic—statutes prescribing registering and fingerprinting, 8 U.S.C. § 1302(a)), reporting, *id.* §§ 1304(a), 1305(a)), and, most notably, federal penalties for willfully failing to comply with the registration requirements, *id.* § 1306(a). *Arizona*, 567 U.S. at 401. The federal government preempted the field of alien registration because its framework was comprehensive, providing "a full set of standards governing alien registration, including the punishment for noncompliance." *Id.* And not only did Arizona impose state penalties for the violation of federal law where federal penalties already existed, its penalties conflicted with those in federal law. *Id.* at 402-03. Under federal law, a failure to register could be punished by probation, a less-severe punishment that Arizona law foreclosed. *Id*. at 403 (discussing Ariz. Rev. Stat. Ann. § 13-1509(D)). The resulting "inconsistency between § 3 and federal law with respect to penalties," the Court held, counseled in favor of preemption. *Id.* at 402-03.

By contrast, SB4 does not create any state offense for aliens, and the federal government has not created a comprehensive framework, including penalties, regulating prohibitions on local law-enforcement officials from having policies that prevent cooperating with federal immigration

officials. Sections 1373 and 1644 do not establish anything near the comprehensive regulatory framework that 8 U.S.C. 1302 *et seq.* does. And as discussed above, in passing §§ 1373 and 1644 Congress did not even enter the field of fashioning penalties for non-compliance localities, instead leaving that up to the States. *See supra* pp. 15-18.

Section 5 of the Arizona law made it a state crime for unlawfully present aliens to seek work or to work without authorization, with penalties including a $2,500 fine and incarceration. *Arizona*, 567 U.S. at 403 (discussing Ariz. Rev. Stat. Ann. §§ 13-2928(C), (F)). The Court held that this conflicted with a comprehensive set of federal laws and regulations concerning alien employment that already punished these crimes "through criminal penalties and an escalating series of civil penalties tied to the number of times an employer has violated the provisions." *Id.* at 404 (citing 8 U.S.C. § 1324a(e)(4), (f); 8 C.F.R. § 274a.10). Moreover, federal law only imposed these penalties on employers who hired unlawfully present aliens, not the aliens themselves. And that was Congress's deliberate decision to do so. The Court pointed to the legislative history of the Immigration Reform and Control Act ("IRCA")—which fashioned the alien employment laws and imposed penalties on employers—as underscoring the "fact that Congress made a deliberate choice not to impose criminal penalties on aliens who seek, or engage in, unauthorized employment." *Id.* at 405. Congress debated whether or not to impose penalties on prospective employees, with members—including, explicitly, the eventual House sponsor of the IRCA—deciding not to. *Id.* at 405-06. Only because of this could the Court determine that Congress made "a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives." *Id.* at 405.

Here, SB4 created no state offense for aliens, and there is no such "conflict in the method of enforcement" (*id.* at 406) between the federal and state government. Congress did not enter the field of providing penalties on any entity for having policies that frustrate local-federal cooperation on immigration matters. And unlike the alien employment statutes at issue in *Arizona*, nothing in the legislative history of §§ 1373 or 1644 indicates that Congress determined that States should

not have the ability to discourage, through appropriately targeted penalties, the local-federal cooperation over immigration matters contemplated by federal law. *See supra* p. 19.

Section 6 of the Arizona statute authorized state officers to conduct warrantless arrests of aliens believed to be removable from the United States based on probable cause. *Arizona*, 567 U.S. at 407 (discussing Ariz. Rev. Stat. Ann. § 13-3883(A)(5)). The Court concluded that the Arizona law would be an obstacle to federal immigration law because it would have given state officers "even greater authority to arrest aliens on the basis of possible removability than Congress has given to trained federal immigration officers." *Id.* at 408. For instance, state officials would have had the power to make immigration arrests regardless of whether a federal warrant had been issued. *Id.* The Court reasoned that alien removal is a federal government function: Congress expressed in 8 U.S.C. § 1357(g) the "limited circumstances in which state officers may perform the functions of an immigration officer." *Id.* By going beyond that—including entrusting to state officials the "determination whether a person is removable"—the Arizona law intruded upon the federal government's immigration authority. *Id.* at 409.

In sharp contrast, SB4 does not attempt to give Texas officials greater authority to detain aliens than that possessed by federal immigration officers. SB4 merely prevents regulated entities in the State from prohibiting their officers from enquiring about immigration status during an otherwise lawful arrest or detention and sharing that information with federal immigration officials, SB4 § 1.01 (§ 752.053), and then requires cooperating with the federal governments' detainer requests, *id.* § 2.01 (art. 2.251(a)); *see id.* § 1.01 (§ 752.053(a)(3)). The federal government, not state officials, remains in control at all points as to who is an unlawfully present alien and who should be detained. *Id.* This is not the "unilateral state action" in immigration enforcement that rendered Arizona's section 6 preempted. *Arizona*, 567 U.S. at 410. Indeed, in the course of finding § 6 preempted, *Arizona* observed that state officials were of course *not* foreclosed from working cooperatively with federal immigration officials. They could, for instance, "provide operational support in executing a warrant," "allow federal immigration officials to gain access to detainees

held in state facilities," or "assist the Federal Government by responding to requests for information about when an alien will be released from their custody." *Id.* (discussing 8 U.S.C. § 1357(d)). SB4 simply seeks to ensure that permissible cooperation.

The only *Arizona* provision resembling SB4 is the one *upheld* by the Supreme Court against a preemption challenge: Section 2(B) of the Arizona law required state and local officers to verify the citizenship or alien status of people arrested, stopped, or detained by contacting federal immigration officials. *Arizona*, 567 U.S. at 411 (discussing Ariz. Rev. Stat. Ann. § 11-1051(B)). The Court canvassed federal immigration statutes and determined that far from Congress intending to foreclose these communications, it actively encourages state and local officers to communicate with federal immigration officials regarding immigration status. *Id.* at 411 ("Consultation between federal and state officials is an important feature of the immigration system."). Although the Court noted that as-applied issues might arise after the law is implemented, it held that, facially, nothing about requiring state officers to verify citizenship of those arrested, stopped, or detained, and then communicating that information to ICE conflicted with the federal scheme of immigration enforcement. *Id.* at 414-15.

SB4 does not even go so far as Arizona's § 2(b), which was upheld by the Supreme Court. SB4 does not *require* state officials to verify the citizenship status of those lawfully detained, but rather prevents local policies that block inquiries about the status of persons arrested or detained. SB4 § 1.01 (§ 752.053). This allows peace officers to communicate and cooperate with federal immigration officials—a goal that accords precisely with why the Supreme Court upheld the Arizona law provision furthering the same goal. By encouraging local law-enforcement agencies to obtain information and communicate with federal immigration officials regarding alien status, SB4 promotes the very sort of cooperation that Congress has "encouraged"—that is, "the sharing of information about possible immigration violations." *Arizona*, 567 U.S. at 412; *see also id.* (discussing 8 U.S.C. § 1373(c)).

Tellingly, the same section of the law upheld by the Supreme Court in *Arizona* (S.B. 1070, § 2) contained a provision strikingly similar to SB4: "No official or agency of this state or a county,

city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law." S.B. 1070, § 2 (Ariz. Rev. Stat. Ann. § 11-1051(A)); *see* SB4 § 1.01 (§ 752.053(a)(1)) ("A local entity or campus police department may not . . . adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws."). And Arizona enforced compliance with that provision with penalties, just like Texas did in SB4. *See* S.B. 1070, § 2 (§ 11-1051(H)) ("[A]ny official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws" is subject to civil penalties of up to $5000 per day."); SB4 § 1.01 (§ 752.056(a)) (providing civil penalties for an intentional violation of § 752.053). The Court was fully aware of these provisions: The United States discussed both provisions in its brief to the Court in support of its argument that S.B. 1070 § 2 was preempted. *See* Brief for the United States, *Arizona v. United States*, 2012 WL 939048, at *47-48 (9th Cir. March 19, 2012) (No. 11-182).

In many ways, SB4 bears more similarity to *Chamber of Commerce v. Whiting*, where the Supreme Court found a different Arizona law was not preempted. That case concerned an Arizona law providing that licenses of state employers that knowingly or intentionally employed unauthorized aliens could be suspended or revoked, and required that all Arizona employers use the federal E-Verify system to ensure that applicants were legally authorized to work. 563 U.S. at 591-92 The Court determined that, although there was significant federal regulation of alien employment, federal law did not provide for licensing penalties of the sort at issue in the Arizona law or otherwise prohibit the states from having those kind of penalties. *Id.* at 599-601. The Court also observed that the Arizona law tracked the provisions in federal law, required state officials to verify their lawful-status determinations with the federal government, and forbade state officials from attempting to make an independent determination. *Id.* at 601. Because the federal government remained in control, the Court reasoned, "there can by definition be no conflict between state and federal law as to worker authorization." *Id.* The Court also highlighted that regulating in-state businesses—even when the subject matter of that regulation touches upon immigration—is not an area

of uniquely federal concern. *Id.* at 604. Finally, the Court held that although Congress created E-Verify as a voluntary system for employers, the federal government "has consistently expended and encouraged" its use, and thus Arizona's requiring its employers to use that system "in no way obstructs achieving those [federal] aims." *Id.* at 609.

Likewise, 8 U.S.C §§ 1373 and 1644 do not provide for conflicting federal penalties or in any way foreclose States from creating their own penalties. SB4 carefully tracks the federal policy of encouraging cooperation between local law-enforcement officers and federal immigration officials, *see* 8 U.S.C. §§ 1373(a), and keeps immigration-status determinations in the hands of the federal government, *see* SB4 § 1.01 (§ 752.053) (discussing sharing information with, receiving information from, and otherwise cooperating with federal immigration authorities). Just as much as the Arizona-based businesses in *Whiting*, the entities regulated in SB4 are properly the subject of state regulation as an exercise of Texas's traditional police powers over its law-enforcement officials. *See supra* pp. 18-19. And the State's methods—from providing tailored penalties to discouraging local officials from non-cooperation policies to requiring regulated entities to comply with ICE detainers—fit with the aims of federal law to promote cooperation in immigration enforcement (8 U.S.C. §§ 1373(a), (b), 1644) and to allow the federal government to take into custody those persons unlawfully present in the United States (*id.* § 1357(d)(3)).

C. The SB4 detainer mandate is not preempted, and it does not require local officers to make unilateral determinations of immigration status.

1. The City of San Antonio claims preemption of SB4's requirement that a law enforcement agency with custody of an alien subject to an ICE detainer shall honor the federal government's detainer request (SB4 § 2.01 (art. 2.251(a)); *see also id.* § 1.01 (§ 752.053(a)(3)) (banning local prohibitions on compliance with immigration detainers)). San Antonio Mot. 34, 37. It argues that by requiring local law-enforcement agencies to comply with ICE detainers, SB4 impermissibly makes mandatory what a Department of Homeland Security regulation makes voluntary given

that the regulation's description of the detainer is as a "request." *Id.* at 34 (discussing 8 C.F.R. § 287.7(a)).[8] This comes nowhere close to a congressional purpose to preempt.

The Supreme Court rejected essentially the same argument in *Whiting*—that an Arizona statute making the E-Verify system mandatory for employers in the state was preempted because Congress made that system voluntary. 563 U.S. at 607-08. As with the E-Verify system in *Whiting*, here, the statutory authority for ICE detainers "contains no language circumscribing state action." *Id.* at 608; *see* 8 U.S.C. § 1357(d)(3).[9] As in *Whiting*, the statute "does, however, constrain federal action." *Whiting*, 563 U.S. at 608. Section 1357(d)(3) provides that federal immigration officers "*shall* promptly determine whether or not to issue" a detainer, and if one is issued and "the alien is not otherwise detained by Federal, State, or local officials," the "Attorney General *shall* effectively and expeditiously take custody of the alien." 8 U.S.C. § 1357(d) (emphases added). The entire point of an ICE detainer request is to allow the federal government to take custody to effectuate removal: The detainer "advise[s] another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien." 8 C.F.R. § 287.7(a). As in *Whiting*, given that purpose, Texas's requirement that law-enforcement agencies in the State honor ICE detainer requests "in no way obstructs achieving those aims." *Whiting*, 563 U.S. at 609. To the contrary, it helps fulfill them. The Court in *Arizona* recognized as much when it cited to the detainer provision in section 1357(d) as a permissible example of how "[s]tate officials can . . . assist the Federal Government by responding to requests for information about when an alien will be released from their custody." 567 U.S. at 410.

Moreover, there is no reason to believe that making compliance with ICE detainers voluntary was some carefully considered federal choice to "steer a middle path" or effect some "careful balance." San Antonio Mot. 37. It is not difficult to see why the Department of Homeland Security

[8] The City cites 8 C.F.R. § 287.7(d)(3), but the handful of words it quotes are in 8 C.F.R. § 287.7(a).

[9] 8 C.F.R. § 287.7 was promulgated under section 287(d)(3) of the Immigration and Nationality Act—*i.e.*, 8 U.S.C. § 1357(d)(3). Indeed, "Congress's only specific mention of detainers appears in INA § 287, 8 U.S.C. § 1357(d)." *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014).

would characterize its interactions with state and local law-enforcement officials regarding ICE detainers as "request[s]." 8 C.F.R. § 287.7(a). As with requiring more concrete forms of cooperation in sections 1373 and 1644, *see supra* pp. 15-18, the federal government's mandating that States and local officials comply with ICE detainers would brush up against the Tenth Amendment. In fact, one court of appeals has held that, "[u]nder the Tenth Amendment, immigration officials may not order state and local officials to imprison suspected aliens subject to removal at the request of the federal government" because "the federal government cannot command the government agencies of the states to imprison persons of interest to federal officials." *Galarza*, 745 F.3d at 643. States are not similarly constrained. *See supra* pp. 16-17.

2. Plaintiffs also claim that SB4's detainer mandate is preempted because it allegedly requires local officers to make "unilateral determinations of immigration status" in enforcing federal immigration detainers. El Cenizo Mot. 19; *accord* San Antonio Mot. 37 ("[SB4] requires local officers to make immigration determinations"). But SB4 does no such thing. SB4 expressly contemplates that the federal government, not the State or a local law enforcement agency, is the entity that determines whether an immigration detainer issues. *See* SB4 § 2.01 (art. 2.251(a)(1)) (concerning detainer requests "by the federal government").

Because an alien will only be detained under SB4's detainer mandate when the federal government makes the detainer request, the process is necessarily subject to the "federal government's supervisory role." *Farmers Branch*, 726 F.3d at 531. And there is "no possibility of conflict" since "the state statute makes federal law its own" as to who is and is not subject to detention. *People of the State of California v. Zook*, 336 U.S. 725, 735 (1949); *cf. Plyler*, 457 U.S. at 212 n.19 ("[I]f the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction."). The State therefore is not creating its own immigration classifications; rather, it is relying on the existing federal immigration classifications and the information provided to the State by the federal government's detainer request.

The statutory language at which plaintiffs take aim is SB4's *exception* that allows a local official *not* to honor a federal detainer request when the individual detained has provided evidence to disprove probable cause of unlawful presence. SB4 § 2.01(b) (art. 2.251(b)); *see* El Cenizo Mot. 19; San Antonio Mot. 37. This provision is not asking a local official to create his own immigration classifications. Nor does this provision even concern a final determination of immigration status; it merely excuses law-enforcement agencies from state-law duties, SB4 § 2.01 (art. 2.251(b)), and any penalties, *id.* § 5.02 (§ 39.07(c)), under SB4 for not enforcing an ICE detainer request when a person in custody presents proof of lawful immigration status.[10] It is similar in both substance and operative effect to the "limit[] . . . built into the state provision" in the Arizona provision upheld by the Supreme Court, by which "a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification." *Arizona*, 567 U.S. at 411; *compare with* SB4 § 2.01 (art. 2.251(b)) ("a person who has provided proof that the person is a citizen of the United States or that the person has lawful immigration status in the United States, such as a Texas driver's license or similar government-issued identification"). This exception is wholly ameliorative in nature and could only possibly operate to the *benefit* of the alien. Accordingly, this exception cannot possibly be preempted as a "unilateral state action to detain." *Arizona*, 567 U.S. at 410.

Even if the ameliorative exception somehow constituted impermissible intrusion on the federal domain to be preempted, the remedy would be to simply eliminate this exception, not any of the other provisions of SB4. SB4 contains a broad severability provision.[11] Plaintiffs have not claimed—because they cannot claim—that striking the ameliorative provision would affect the "functional coherence" of the statutory provision requiring compliance with federal immigration

[10] This is, at the very least, a plausible reading of SB4 §§ 2.01 (art. 2.251(b)) and 5.02 (§ 39.07(c)). And when statutory provisions are "susceptible [to] more than one plausible reading," courts "should accept the reading that disfavors pre-emption." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).

[11] SB4 § 7.01 ("It is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act to each person or entity, are several from each other.").

detainers, much less the statute as a whole. *Farmers Branch*, 726 F.3d at 537. The appropriate remedy therefore would be to sever that provision and uphold the rest of the statute. *See, e.g.*, *Leavitt v. Jane L.*, 518 U.S. 137, 139-40 (1996) (per curiam) (reversing the Tenth Circuit's total invalidation of a Utah statute on a facial challenge, and holding that federal courts must apply a state-law severability provision to preserve the valid scope of the statute to the maximum extent possible); *BCCA Appeal Grp.*, 496 S.W.3d at *8; Tex. Gov't Code § 311.032(a) ("If any statute contains a provision for severability, that provision prevails in interpreting that statute.").

III. Plaintiffs' Vagueness Challenge Is Meritless.

Several plaintiffs contend that SB4's anti-sanctuary and ICE-detainer provisions violate due process as unconstitutionally vague. El Cenizo Mot. 20-28; El Paso Mot. 25-29; San Antonio Mot. 46-48. That is meritless. A heavy burden applies to this challenge because of its facial posture. Plaintiffs cannot meet that requirement because some of plaintiffs' conduct is undisputedly prohibited by SB4, and thus SB4 is not facially void for vagueness. *See infra* Part 0.A. And even considering the specific hypothetical as-applied scenarios envisioned by plaintiffs, SB4 is not unconstitutionally vague because it neither deprives regulated entities of fair notice nor invites arbitrary enforcement. *See infra* Part 0.B.

A. Plaintiffs' challenge fails because SB4 is not facially vague.

The pre-enforcement posture of plaintiffs' vagueness challenge requires them to show that SB4 is facially vague, meaning impermissibly vague in *all* of its applications. They cannot meet that burden. Plaintiffs readily understand that some of their desired policies or actions are prohibited by SB4. Whether plaintiffs can imagine taking yet other actions that might arguably present closer as-applied questions under SB4 cannot fuel a facial vagueness challenge at this pre-enforcement stage. Such an as-applied challenge must await any eventual enforcement proceeding against that conduct—which may very well never arise.

1. Because plaintiffs bring a pre-enforcement challenge to SB4, they are necessarily raising a facial challenge and thus must show that the challenged provisions are invalid in *all* applications. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5, 497 (1982) ("A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague . . . . mean[ing] a claim that the law is invalid *in toto*—and therefore incapable of any valid application" (citation and quotation marks omitted)). Outside of a First Amendment free speech challenge, the overbreadth doctrine does not apply. *Id.* at 495 & n.7. So when "laws that do not threaten to infringe constitutionally protected conduct" are "challenged facially as unduly vague, in violation of due process," the challenger "'must demonstrate that the law is impermissibly vague in all of its applications.'" *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 546 (5th Cir. 2008) (quoting *Hoffman Estates*, 455 U.S. at 494-95, 497).

That standard applies here because—apart from their First Amendment free speech claims dealt with separately below, *see infra* Parts IV-V—plaintiffs do not argue that SB4 regulates activity protected by the Constitution.[12] SB4 regulates policing in the State of Texas, which is not constitutionally protected conduct.

A pre-enforcement, facial vagueness challenge is particularly "difficult, perhaps impossible, because facts are generally scarce." *Roark & Hardee LP*, 522 F.3d at 547. In *Roark & Hardee* there was an "adequate record of the ordinance's operation and particularized harmful effect on all Plaintiff bars and owners" only once the defendant issued several post-suit citations, which then "permit[ted] a determination of whether the [challenged] provision [wa]s impermissibly vague in all its applications." *Id.* Here, SB4 has not yet gone into effect. Claims that SB4 could *never* be validly enforced are "entirely hypothetical" and require "sheer speculation," and thus plaintiffs

[12] Plaintiffs allege that SB4 "threatens to *inhibit* the exercise of constitutional rights." Mot. 21 (quoting *Hoffman Estates*, 455 U.S. at 498-99). Plaintiffs offer no support for that statement, which in any event is not an assertion that SB4 itself regulates constitutionally protected conduct.

"cannot prevail in [a] preenforcement challenge" based on those allegations. *Holder v. Humanitarian Law Proj.*, 561 U.S. 1, 24, 25 (2010).

2. Not only is it speculative to claim that SB4 could *never* have clear application, but plaintiffs themselves offer numerous examples of their own conduct that SB4 clearly proscribes. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates*, 455 U.S. at 494-95. The court must "therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Id.*

Plaintiffs' own declarations demonstrate that SB4 is not "impermissibly vague in all its applications, including its application to the party bringing the vagueness challenge." *United States v. Clark*, 582 F.3d 607, 612-13 (5th Cir. 2009) (quoting *Hoffman Estates*, 455 U.S. at 495; *Roark & Hardee*, 522 F.3d at 546-47, 551 n.19). For example, El Cenizo's mayor alleges it has a "sanctuary city" policy that "limits the situations in which [city] . . . officials can engage in immigration enforcement or collect and disseminate such information." ECF No. 24-8 (Reyes Decl.) ¶ 19. El Cenizo admits that "SB4 would prohibit the enforcement of [its] ordinance." *Id.* Likewise, the Maverick County Sheriff claims that he "currently instruct[s] [his] deputies not to inquire as to an individual's immigration status during a law enforcement contact" but that he must abandon that policy. ECF No. 24-5 (Schmerber Decl.) ¶ 19; *accord* ECF No. 58-1 (Hernandez Decl.) ¶ 48 (stating that SB4 prohibits her "written policy [that] currently instructs [her] deputies not to inquire about a person's immigration status in the jail, on patrol, or elsewhere"); *see also* San Antonio Mot. 8 (describing San Antonio Police Department policy). Sherriff Schmerber also states that he has announced a policy that "Maverick County Sheriff's Office will not participate or cooperate in the arrests of individuals for civil immigration violations," ECF No. 24-5 ¶ 9, whereas SB4 removes his "discretion" to "decline detainer requests from the federal government," *id.* ¶¶ 15-16; *accord* ECF No. 58-1 ¶¶ 37, 46 (indicating that Sheriff Hernandez could comply with SB4 by no longer declining "requests from federal immigration authorities to assist them in the apprehension of individuals" and by "honor[ing] all detainer requests from ICE"); *see also* San Antonio Mot. 9

(describing current "discretion[ary]" practice of honoring ICE detainers). The Maverick County Constable similarly identifies measures he can take to avoid an SB4 violation, but would like to forego some of those measures that he views as not the "main purpose of [his] job," notwithstanding the State's control over the job duties of its officers. ECF No. 58-1 (Hernandez Decl.) ¶¶ 12-13, 15; *accord* ECF No. 24-6 (Hernandez Decl.) ¶ 46; ECF No. 57-4 (Manley Decl.) ¶ 23 (Austin Police Chief).[13]

As these examples and admissions demonstrate, SB4 has clear applications—embracing some of plaintiffs' own desired conduct and policies. Because SB4 undoubtedly prohibits at least some of plaintiffs' own conduct, it is facially valid regardless of plaintiffs' arguments about how SB4 could hypothetically apply in other scenarios. *Holder*, 561 U.S. at 22; *Roark & Hardee LP*, 522 F.3d at 547. Outside actual enforcement proceedings, those as-applied arguments would lead to unnecessary advisory rulings. *See, e.g.*, *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 686 (2d Cir. 1996) (refraining from "ruling on an as-applied challenge to an allegedly vague statute when the ordinance would be valid as applied to at least one activity in which plaintiff is engaged"). Particularly with respect to sanctions for noncompliance, "gradations of fact or charge would make a difference as to criminal liability," and so "adjudication of the reach and constitutionality of [the statute] must await a concrete fact situation." *Holder*, 561 U.S. at 25 (quoting *Zemel v. Rusk*, 381 U.S. 1, 20 (1965)).

Plaintiffs' argument that SB4 is void for vagueness because it invites standardless prosecution should be rejected for similar reasons. *See* El Cenizo Mot. 26-27; San Antonio Mot. 47-48. Where a plaintiff's conduct is clearly foreclosed by a statute, a preenforcement challenge as inviting arbitrary prosecution is inappropriate. *See, e.g.*, *Hoffman Estates*, 455 U.S. at 503-04 (rejecting a similar claim).[14]

[13] The alleged costs of compliance arise from Constable Hernandez's "own decision to obey the statute rather than risk prosecution," and thus do not support pre-enforcement relief. *Bankshot Billiards, Inc. v. City of Ocala*, 634 F.3d 1340, 1351 (11th Cir. 2011).

[14] The San Antonio plaintiffs are also wrong that SB4 "imbues individual officers with authority to make ad hoc interpretations of 'state and federal immigration laws' with no oversight or repercussions" and

B. Even considering SB4 as applied to hypothetical scenarios beyond those that plaintiffs' recognize are clearly prohibited, SB4 is not unconstitutionally vague.

As just discussed, under case law governing this pre-enforcement posture, plaintiffs' facial vagueness claim must fail because plaintiffs cannot show facial invalidity in *all* applications in which SB4 might apply. But even considering the hypothetical scenarios raised by plaintiffs, their vagueness argument as applied in those scenarios would still fail.

When a law carries criminal or significant civil penalties, the vagueness test asks whether the law is definite enough "to provide a person of ordinary intelligence fair notice of what is prohibited" or is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder*, 561 U.S. at 18 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)); *see Roark & Hardee LP*, 522 F.3d at 552-53. This is a high standard for a challenger, as he "must prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that *no standard of conduct is specified at all*." *Hoffman Estates*, 455 U.S. at 495 n.7. Legislators therefore need not "delineate the exact actions" a party must take to avoid liability, as "[o]nly a *reasonable degree of certainty* is required." *Roark*, 522 F.3d at 552-53.

The hallmark of a vague statute is tying culpability to "untethered, subjective judgments." *Holder*, 561 U.S. at 21. For example, statutes cannot criminalize "annoying" or "indecent" conduct. *Williams*, 553 U.S. at 306. Those terms are "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id.* But where statutory definitions, narrowing context, or settled meanings for legal terms indicate a particular meaning for a statutory term, a court must avoid holding the term vague, as "every reasonable construction must be resorted to[] in order to save a statute from unconstitutionality." *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1998).

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that the attorney general has no criteria to determine whether "'facts support[] an allegation'" in an SB4 citizen complaint. San Antonio Mot. 47-48. That SB4 does not provide additional guidance in those respects is best understood as leaving intact the existing responsibilities of law enforcement officers and the Attorney General as provided elsewhere under Texas law.

As shown below, SB4's anti-sanctuary and detainer-compliance provisions provide fair notice of what is prohibited. SB4 and common usage provide meaning to each term challenged by plaintiffs. *Cf.* El Cenizo Mot. 22-28; El Paso Mot. 26-27.

1. ***Anti-sanctuary provisions.*** Plaintiffs allege that terms such as "policy," "materially," "limit," "reasonable," "necessary," "assist," and "cooperate" are unconstitutionally vague. But terms such as these are used routinely throughout judicial opinions and in scores of statutes to delineate what conduct is covered by a certain law. They are not fatally vague unless all sorts of other federal and state statutes are. A context-specific analysis of these terms in SB4 confirms that they specify a standard of conduct.

The term "materially limit" in SB4's anti-sanctuary provisions is not untethered to meaning. *Cf.* El Cenizo Mot. 23; El Paso Mot. 26. SB4 bars a policy or conduct that "prohibits or materially limits the enforcement of immigration laws," including several enumerated activities. SB4 § 1.01 (§ 752.053(a)(1), (a)(2), (b)). SB4 broadly defines *policy* to include a "formal, written rule, order, ordinance, or policy," as well as an "informal, unwritten policy." *Id.* § 1.01 (§ 752.051(6)). In that context, a "material limit" on "immigration law" enforcement is a policy or action addressing immigration-law enforcement specifically, as opposed to routine police matters, and either prohibits immigration law-enforcement activity or significantly limits that activity from its otherwise-prevailing scope. Under that straightforward reading, "simple, day-to-day decision[s] regarding how a city or county allocates its scarce police resources" are not a "material[] limit" on the enforcement of immigration law. *Cf.* El Cenizo Mot. 24.[15]

This contextual meaning of "materially limit" comports with dictionary definitions. A "material" limit is one that is "substantial," as opposed to insignificant. Webster's New International Dictionary 1392 (3d ed. 2002). "[M]aterial" also suggests a "logical connection" between

[15] The El Paso plaintiffs also challenge "policy" as "circular and confusing" because that term is defined as including both a "'formal . . . policy" and an "informal . . . policy" (El Paso Mot. 26 (citing Tex. Gov't Code § 752.051(6)), but SB4's definition merely captures that this term is intended broadly to encompass both formal and informal expressions of "policy," a term used in countless cases and statutes.

the action and the "consequential facts" creating the action's significance—here, the effect on enforcement of immigration law enforcement, here. Black's Law Dictionary 1124 (10th ed. 2014).

Plaintiffs' related complaint that SB4 does not define "assisting or cooperating" with a federal immigration officer as "reasonable or necessary" is also misplaced. El Cenizo Mot. 24-25. Both phrases address cooperation in the context of participation with "a federal immigration officer." SB4 § 1.01 (§ 752.053(b)(3)). SB4 does not require regulated entities to themselves affirmatively decide whether enforcement participation through assistance or cooperation is "reasonable or necessary." Rather, a request from a federal immigration officer for "enforcement assistance," *id.* (§ 752.053(b)(3)), puts covered entities on notice of when SB4's prohibition of blocking immigration-law enforcement activity comes into play.[16] Insofar as plaintiffs argue that SB4 gives no guidance on "whether it is reasonable or necessary to refuse cooperation where they believe federal agents are using excessive force or are failing to comply with Fourth Amendment search requirements," El Cenizo Mot. 25, plaintiffs ignore that in those scenarios, those independent legal doctrines, not local policy or practice, function as the limits on officers' participation.

Finally, any purported vagueness in other terms does not warrant relief. *See* El Cenizo Mot. 25-26. "[P]attern or practice" is not unconstitutionally vague. El Cenizo Mot. 25; El Paso Mot. 26. That phrase appears in various legal contexts. *See, e.g.*, *Rogers v. Pearland Indep. Sch. Dist.*, 827 F.3d 403, 408 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 820 (2017) (Title VII employment discrimination); *Duvall v. Dallas County*, 631 F.3d 203, 206 (5th Cir. 2011) (per curiam) (*Monell* liability). Nor is "immigration laws" impermissibly vague. El Cenizo Mot. 25-26; San Antonio Mot. 47. SB4 defines "immigration laws" as "the laws of this state or federal law relating to aliens, immigrants, or immigration, including the federal Immigration and Nationality Act (8 U.S.C. Section 1101 et seq.)." SB4 § 1.01 (§ 752.051(2)); *id.* § 1.01 (§ 772.0073(3)).

[16] The same goes for El Paso's argument that local entities "must allow federal immigration officers to enter jails to 'conduct enforcement activities,' but there is no explanation of what precisely those 'activities' include." El Paso Mot. 27 (quoting § 752.053(b)(4)).

2. *ICE-detainer provisions.* Plaintiffs' vagueness challenge regarding ICE detainers is not aimed at the detainer *mandate* but, rather, at the *exception* allowing peace officers not to fulfill an ICE detainer if an individual presents proof of "lawful immigration status." El Cenizo Mot. 27-28. Thus, any potential vagueness with that provision would only justify a remedy that strikes the exception—and not the rest of the detainer mandate. *See infra* Part IV.B.[17]

In any event, none of SB4's detainer provisions are detached from all meaning. Plaintiffs note that an individual with lawful presence in this country might not have identification, or an individual with identification might not actually have "formal lawful immigration status." El Cenizo Mot. 27. The El Paso plaintiffs similarly argue that "officers will simply not be able to know whether a person may have 'lawful immigration status.'" El Paso Mot. 27.[18] But that argument overlooks that all adult aliens in the country are *required at all times*, under federal law, to carry documentation of their alien status. *See* 8 U.S.C. § 1304(e).[19] This argument also overlooks that the statute upheld in *Arizona* similarly provided that "a detainee is presumed not to be an alien unlawfully present in the United States if he or she provides a valid Arizona driver's license or similar identification." 567 U.S. at 411. In any event, SB4's detainer exception applies when an individual has "provided proof" of immigration status, regardless of whether that documentation is accurate and establishes that the alien is lawfully present in the country. SB4 § 2.01 (art.

[17] The same is true of El Paso's contention that "place of worship" is vague in § 752.053(c). El Paso Mot. 27. If that term is vague, then the remedy is to strike that exception to SB4's enforcement-assistance provision. *See* SB4 § 1.01 (§ 752.053(c)). In any event, that term is not vague simply because it is undefined, as it should be ascribed its commonly understood meaning as it is used in dozens of Texas laws.

[18] The El Paso plaintiffs further suggest that SB4 "provides no explanation for what local officials are supposed to do" when faced with an individual who "may be a United States citizen or have authorization to be in the country but not have a document to prove it." El Paso Mot. 28. That argument is wrong because it merely describes purported uncertainty about an *exception* to the detainer mandate—officials can comply with SB4 by honoring the detainer. That individuals may not possess documentation to trigger the detainer-mandate exception does not mean that the detainer mandate delegates arbitrary enforcement authority. *See* El Paso Mot. 29.

[19] Plaintiffs' suggestion that aliens with "deferred action" have authorized presence without lawful status is mistaken. *Compare* El Cenizo Mot. 27, *with Texas v. United States*, 809 F.3d 134, 184-86 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016). The federal government has deemed "deferred action status" as "lawful status." *E.g.*, U.S. Br. as Amicus Curiae in Opp. to Reh'g En Banc 16, *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053 (9th Cir. 2014) (No. 13-16248) (ECF No. 75).

2.251(b)); *id.* § 5.02 (§ 39.07(a)-(b)). Nothing in SB4 "forces [local officials] to make immigration status determinations." San Antonio Mot. 9. Moreover, the requirement of a "knowing[]" violation to trigger SB4's criminal sanctions, SB4 § 5.02 (§ 39.07(a)(2)) and that an entity "intentionally violate[d]" the detainer duty to trigger civil penalties, SB4 § 1.01 (§ 752.051(a)(3)), further guards against any potential unconstitutional vagueness. *Hoffman Estates*, 455 U.S. at 498-99.

IV. SB4's "Endorsement" Provision Does Not Violate the First Amendment.

Plaintiffs point to a single word in SB4—"endorse"—to argue that the statute constitutes unconstitutional viewpoint discrimination violating the First Amendment. El Cenizo Mot. 28-30; San Antonio Mot. 24-29, 51; Austin Mot. 10-11; El Paso Mot. 21. The *in pari materia* canon requires reading the undefined word "endorse" in its narrower sense, avoiding concerns about infringement upon elected officials' political speech. Moreover, even if that single word is held overbroad, the appropriate remedy is to strike only that word and uphold the rest of the statute.

A. SB4 provides that "[a] local entity or campus police department may not . . . adopt, enforce, or endorse a policy under which the entity or department prohibits or materially limits the enforcement of immigration laws." SB4 § 1.01 (§ 752.053(a)(1)). None of these serial verbs—*adopt*, *enforce*, and *endorse*—are defined in the statute. Plaintiffs attack only *endorse*, implicitly recognizing that there is no First Amendment problem with prohibiting local entities from adopting and enforcing policies that limit the enforcement of immigration laws. *See* El Cenizo Mot. 28-29; San Antonio Mot. 24-29; Austin Mot. 10-12; El Paso Mot. 21.

Plaintiffs argue that *endorse* is so vague as to be unconstitutional, El Cenizo Mot. 30; San Antonio Mot. 47; El Paso Mot. 21, yet clear enough to constitute an unconstitutional "ban on speech," El Cenizo Mot. 28; San Antonio Mot. 24; Austin Mot. 10-12. As explained above regarding vagueness, the issue is whether the word provides no standard at all to determine whether conduct is covered. *See supra* Part III.B. *Endorse* is not a term of art, and it is readily susceptible to a common-sense definition—*i.e.*, a "straightforward, textually-based limit," San Antonio Mot. 27— that does not present constitutional concerns. *See infra* pp. 42-43. SB4 itself even provides

four concrete examples of policies that local officials are prohibited from endorsing. SB4 § 1.01 (§ 752.053(b)(1)-(4)); *see supra* pp. 4-5.

Plaintiffs wish to define *endorse* broadly, in a way that would sweep in the political speech of candidates for public office and lead to the plaintiffs' purported parade of horribles. El Cenizo Mot. 28-29; San Antonio Mot. 25-26; Austin Mot. 11-12; El Paso Mot. 21. But plaintiffs' constitutionally problematic definition is not compelled by the text of SB4. And particularly in facial challenges like this one, statutory provisions must be interpreted in a way that avoids constitutional concerns. *See, e.g.*, *United States v. Wallington*, 889 F.2d 573, 576 (1989) ("[A statute] should be construed narrowly to avoid overbreadth, if the statute is fairly subject to such a limiting construction."); *Virginia v. Am. Booksellers Ass'n Inc.*, 484 U.S. 383, 397 (1988) ("It has has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld."). This principle accords with the general practice that "[f]acial challenges to the constitutionality of statutes should be granted 'sparingly; and only as a last resort,' so as-applied challenges are preferred." *Hersh v. United States*, 553 F.3d 743, 762-63 (5th Cir. 2008) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).[20]

The term *endorse* in SB4 is readily susceptible to a narrower construction that would resolve any doubt as to its constitutional validity: the dictionary definition, "to sanction." Webster's New International Dictionary 845 (2d ed. 1945); *accord* Webster's New World College Dictionary 480 (5th ed. 2016); *cf. In re Hecht*, 213 S.W.3d 547, 571 (Tex. Spec. Ct. Rev. 2006) (appointed by Tex. Sup. Ct.) (rejecting a broad definition of "endorsement" in a judicial ethics canon, consulting leading dictionaries, and holding that "endorse" means "more than mere support"). To

[20] This is particularly true in the overbreadth context. *See* El Cenizo Mot. 29 n.9 (arguing that "[t]he endorsement ban" is overbroad); *accord* San Antonio Mot.26-29; Austin Mot. El Paso Mot. 21 & n.23. Because the "invalidation of a statute on overbreadth grounds brings about total judicial abrogation of even the legitimate regulation at the core of the overbroad statute . . . where there are a substantial number of situations to which a statute may validly be applied, [courts] eschew reliance on the overbreadth doctrine." *Wallington*, 889 F.2d at 576.

"sanction," in turn, means "to ratify or confirm," or "to authorize or permit; countenance." Webster's New World College Dict. 1286. And, of course, a use of official power is required to ratify or authorize.

So defined, it is not "difficult to imagine any legitimate applications" (El Cenizo Mot. 29 n.9) of the endorsement prohibition. SB4 is designed to stop local law enforcement agencies from having policies[21] that obstruct cooperation with federal immigration officials. The endorsement prohibition furthers that goal by providing that a local law-enforcement official may not ratify, confirm, authorize, or permit in their agency a policy contrary to § 752.053(b)(1)-(4).

In addition to properly avoiding any constitutional concerns, this common-sense definition satisfies the requirement that undefined statutory terms be given "fair meaning in accord with the manifest intent of the lawmakers." *United States v. Moore*, 423 U.S. 122, 145 (1975). The statute provides that local law-enforcement officials may not "adopt, enforce, or endorse" policies limiting immigration-law enforcement. SB4 § 1.01 (§ 752.053(a)(1)). When a statutory term is unclear, courts commonly look to surrounding statutory provisions "[o]n the same subject" for guidance. Black's Law Dictionary 911 (10th ed. 2014) (discussing the *in pari materia* statutory construction canon). Accordingly, the term "endorse" should be construed *in pari materia* with the other prohibited local-entity actions in the same clause, namely "adopt" and "enforce." *See Pervis v. LaMarque Ind. Sch. Dist.*, 466 F.2d 1054, 1057 (5th Cir. 1972). As plaintiffs tacitly recognize, neither of those actions implicates political speech or speech more generally. It would be odd for the Legislature to have intended a definition of "endorse" so broad as to implicate First Amendment concerns, when the prohibited actions right around it—to say nothing of the statute as a whole—say nothing at all about political speech or political campaigns.

Prohibiting officials from ratifying, confirming, authorizing, or permitting a prohibited policy in their agencies has nothing to do with the political process, political campaigns, or constitutionally protected speech generally. *Cf.* El Cenizo Mot. 29; San Antonio Mot. 25-26; Austin Mot.

[21] The statute defines "policy" as a "formal, written rule, order, ordinance, or policy and an informal, unwritten policy." SB4 § 1.01 (§ 752.051(6)).

11-12; El Paso Mot. 21. The State of Texas necessarily effectuates public policy and exercises its traditional police powers through its counties and their law-enforcement officials. *See generally* Tex. Const. arts. V, § 23; XI, § 1. The noncooperation policies that SB4 aims to prevent would be taken in those individuals' official capacities as government employees.[22]

B. In any event, even if the court were to hold that "endorse" constitutes unconstitutional viewpoint discrimination, the appropriate remedy would be to strike that word, and only that word, from the statute. *See, e.g.*, *Leavitt*, 518 U.S. at 139-40 (holding that a federal court must preserve the valid scope of a state statutory provision to the greatest extent possible in accordance with state law on severability). The Texas Legislature indicated that severability is to operate in this manner, both as a general principle, Tex. Gov't Code § 311.032(a), and in SB4 specifically, SB4 § 7.01 ("It is the intent of the legislature that every provision, section, subjection, sentence, clause, phrase, or *word* in this Act, and every application of the provisions in this Act to each person or entity, are severable from each other.") (emphasis added).

The term *endorse* appears just one time as one of three alternative verbs, in a single statutory provision in a statute filled with thousands of other words. Severing that one word would not present any problems that counsel against severing. Doing so would not require the Court "to write words into the statute." *Randall v. Sorrell*, 548 U.S. 230, 262 (2006). The word is not integral to the "functional coherence" of the statute. *Farmers Branch*, 726 F.3d at 537. Nor is that one word "so interwoven" in the statute, or even in the particular provision itself, that it "cannot be separated." *Hill v. Wallace*, 259 U.S. 44, 70 (1922). In this scenario, the only sensible remedy for a constitutional problem with "endorse" that could not be resolved through the preferred means of a limiting construction would be to strike that term alone. *See, e.g.*, *Phelps-Roper v. Koster*, 713 F.3d 942, 953 (8th Cir. 2013) (holding that one unconstitutional word in a statute should be

[22] As the Supreme Court has recognized, "[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). This is necessarily so. "Official communications," after all, "have official consequences, creating a need for substantive consistency and clarity." *Id.* at 422. As a result, "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Id.* at 421-22.

stricken, and the rest of the statute upheld, because the offending word "appears just once in each statute, and only as part of a serial list").

V. SB4 Does Not Violate the First Amendment By Chilling Protected Activity Through Official Retaliation.

El Paso plaintiffs TOPEF and MOVE also argue that SB4 chills protected association, assembly, and petition rights through the threat of retaliation against their members for education activities, protests, and other forms of civic engagement. El Paso Mot. 23-24 (citing, e.g., *Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997)). These plaintiffs cite *Texas v. Travis County*, No. 1:17-CV-00425-SS (W.D. Tex.), as proof that this purported retaliation is not merely "hypothetical," since that lawsuit named TOPEF as a defendant. El Paso Mot. 23. Those arguments fail because they both mischaracterize the *Travis County* litigation and fail to meet the requirements for a First Amendment retaliation claim under established law.

A. First, TOPEF is wrong that the State's *Travis County* action is evidence of retaliation. That suit merely seeks a declaration that SB4 is not facially invalid on specified grounds. *See* First Am. Compl., *Texas v. Travis County*, *supra* (W.D. Tex. May 31, 2017) (ECF No. 23). Texas filed that declaratory judgment action *before* the El Paso plaintiffs' lawsuit here, not "just days" after it. El Paso Mot. 23. Texas then amended its complaint to add as defendants entities that had challenged SB4 on grounds related to Texas's pending claims for declaratory relief. Plaintiffs' suggestion that Texas has no "explanation for why TOPEF should be a named defendant" other than "that TOPEF sought to vindicate the rights of itself and its members in federal court" (El Paso Mot. 23 n.27) mischaracterizes the declaratory action's posture: Texas sued to get a definitive resolution of the lawfulness of SB4, and parties were added to that *Travis County* litigation after they sued Texas in other courts on grounds related to the pending declaratory judgment action.

B. Plaintiffs' claim is also unsupported by First Amendment retaliation case law. Courts recognize that the First Amendment prohibits government officials from retaliating against individuals for speech or engaging in other constitutionally protected activity. *E.g.*, *Hartman v. Moore*, 547 U.S. 250, 256 (2006). But retaliation claims must fail unless the "protected activity

was the cause of the Government's retaliation." *Anderson*, 125 F.3d at 161; *accord Allen v. Cisneros*, 815 F.3d 239, 244 (5th Cir. 2016) (per curiam). The El Paso plaintiffs cannot make that showing here. Texas's lawsuit was for a declaration of SB4's facial validity regarding several constitutional claims, not retaliation for engaging in protected activity. *See Anderson*, 125 F.3d at 161 (listing elements of retaliation claim). Retaliation is actionable only when it is "the but-for cause of official action." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). "[A] retaliation claim is only applicable 'when non-retaliatory grounds are in fact insufficient to provoke the adverse consequences.'" *Allen*, 815 F.3d at 244. As shown above, Texas's related litigation involving TOPEF does not meet that standard.

Plaintiffs' claims based on the threat of future retaliatory action (El Paso Mot. 24) are similarly unavailing. In this pre-enforcement posture, plaintiffs cannot establish that retaliation caused hypothetical future action. For example, plaintiffs cannot demonstrate that a future enforcement actions would not be supported by a reasonable belief that the challengers have engaged in prohibited activity in violation of state law. *See Cripps v. La. Dep't of Agric. & Forestry*, 819 F.3d 221, 231 (5th Cir. 2016) (rejecting a retaliation claim because a governmental "decision was directly supported by the reasonable belief that Willie Cripps failed to use the proper amount of termiticide in the treatment of properties, a direct violation of state law."). The El Paso plaintiffs' contentions regarding the alleged chilling effect of conforming one's speech to avoid adverse consequences is really just a claim that SB4 imposes unconstitutional conditions on First Amendment activity. *See* El Paso Mot. 24. Indeed, the cases they cite did not involve official retaliation for engaging in protected speech. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 198 (1999) (name-badge requirement for canvassers in light of potential for harassment); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (striking down membership-disclosure requirement in light of risk of "economic reprisal" and "other manifestations of public hostility").

That theory fails because the unconstitutional condition that plaintiffs allege does not exist. SB4 does not "grant[] local officials unbridled discretion to target speakers of certain viewpoints, thereby 'sanction[ing] a device for the suppression of the communication of ideas and permit[ing]

the official to act as a censor.'" El Paso Mot. 24 (quoting *Cox v. Louisiana*, 379 U.S. 536, 557 (1965)). Plaintiffs also cite *Bourgeois v. Peters*, 387 F.3d 1303, 1317 (11th Cir. 2004)—which was not a retaliation case—in which a policy giving officers "unbridled discretion" to target unpopular speech violated the Fourth Amendment. El Paso Mot. 24. Yet SB4 confers no such authority. SB4 does not authorize local law enforcement officials "to determine which expressions of view will be permitted and which will not." *Cox*, 379 U.S. at 557 (discussing statute that on its face precluded all street assemblies and parades but in practice led local police to "permit or prohibit parades or street meetings in their completely uncontrolled discretion."). SB4 merely lists a number of immigration-related activities that may not be prohibited or materially limited at the local level, and provides obligations to comply with immigration detainer requests, but otherwise leaves law-enforcement responsibilities intact. *See supra* pp. 3-4. Plaintiffs cannot show at this stage that officials will exceed the bounds of their authority, let alone because of anything SB4 prohibits or requires. *See Cripps*, 819 F.3d at 231 (rejecting retaliation claim because the governmental body at issue "was within its regulatory bounds to take the action it did"). But in any event, those future claims lie against local officials abusing their existing law-enforcement authority as clarified by SB4, not against the State. *Cf.* El Paso Mot. 24.

VI. SB4's Detainer Mandate Does Not Violate the Fourth Amendment.

Various plaintiffs challenge SB4 as violating the Fourth Amendment based on its detainer provisions. *E.g.*, El Cenizo Mot. 30-34; San Antonio Mot. 29-32. But SB4 does not violate the Fourth Amendment by requiring Texas law enforcement officers to comply with validly promulgated immigration detainer requests from federal immigration officials. The Austin plaintiffs, who do not receive immigration detainer requests, also challenge SB4 on the grounds that it will lead police officers to conduct investigatory detentions into detainer-request status or to extend law-enforcement encounters in violation of the Fourth Amendment. Austin Mot. 14-15. This claim fails because SB4 requires no such actions. San Antonio's attempt to frame the Fourth Amendment

claim as a Fourteenth Amendment substantive and procedural due process challenge also fails because those claims merely duplicate plaintiffs' unsuccessful Fourth Amendment challenge.

A. SB4's detainer mandate does not violate the Fourth Amendment.

Plaintiffs' Fourth Amendment claim fails because SB4's detainer provisions do not "force law enforcement officers to violate their constituents' rights" or "prohibit[]" probable-cause determinations, El Cenizo Mot. 30, let alone in a way that lets law enforcement officials assert the hypothetical Fourth Amendment claims of others. In fact, compliance with SB4 comports with the Fourth Amendment's prohibitions against unreasonable seizures. And plaintiffs identify no basis for facial relief since SB4 undisputedly has at least *some* valid applications and the risk to plaintiffs in complying with SB4 is minimal.

1. At the outset, plaintiffs fundamentally ignore what SB4 does. This flaw masks the true nature of plaintiffs' claim—one that tries to assert the putative Fourth Amendment rights of others.

An immigration detainer request is "a federal government request to a local entity to maintain temporary custody of an alien, including a United States Department of Homeland Security Form I-247 document or a similar or successor form." SB4 § 1.02 (§ 772.0073(a)(2)). A detainer advises other law enforcement agencies that ICE seeks the custody of an alien who is in the custody of that agency, for the purpose of arresting and removing the alien. 8 C.F.R. § 287.7(a). A detainer requests that such agency advise ICE prior to releasing the alien, so that ICE may arrange to assume custody. *Id.* A detainer may also ask the local law enforcement agency to hold the person for up to 48 hours past an impending release date in order to assume custody. *Id.* § 287.7(d).[23]

[23] The affidavit of Travis County Sheriff Hernandez submitted in support of the Travis County plaintiffs' joinder in the El Cenizo plaintiffs' motion states incorrectly that an ICE detainer necessarily requests extension of custody "for a period of up to 48 hours (excluding Saturdays, Sundays, and holidays, 8 C.F.R. §287.7 (d)) beyond the time when the individual would otherwise be released from custody." ECF No. 58-1 (Hernandez Decl.) ¶ 21. In reality, an ICE detainer may simply request notification of an individual's upcoming release date, and in the event extended detention is requested, ICE no longer contains an exclusion of Saturdays, Sundays, and holidays when calculating a request. *See* ICE Policy 10074.2, Issuance of Immigration Detainers by ICE Immigration Officers ¶ 2.7 (last visited June 16, 2017), https://www.ice.gov/sites/default/files/documents/Document/2017/10074-2.pdf.

As of April 2, 2017, ICE's detainer policy requires that "immigration officers must establish *probable cause* to believe that the subject is an alien who is removable from the United States before issuing a detainer with a federal, state, local, or tribal [law enforcement agency]."[24] ICE requires that all detainers be accompanied by one of two types of federal immigration warrants, which is signed by an authorized ICE immigration officer.[25]

SB4 provides that officials in Texas have a duty, enforced by potential penalties or removal from office, to comply with immigration detainer requests from federal immigration officials. *See supra* pp. 6-9. There are exceptions to this duty and thus exceptions to punishment when an alien subject to an immigration detainer offers "proof that the person is a citizen of the United States or that the person has lawful immigration status in the United States, such as a Texas driver's license or similar government-issued identification." SB4 §§ 2.01, 5.02 (art. 2.251(b); § 39.07(c)).

Against this backdrop, plaintiffs' Fourth Amendment challenge is doomed. Plaintiffs do not even allege that SB4 itself somehow effects a Fourth Amendment seizure. As the Austin plaintiffs concede, it does not. Austin Mot. 13-14. Rather, plaintiffs argue that they do not wish to honor some or all immigration-detainer requests; that SB4 will make them do so; and that, in the course of doing so, officers will violate the Fourth Amendment rights of third parties.

This theory fails. "As a general rule, 'Fourth Amendment rights are personal[,]' and 'may not be vicariously asserted.'" *United States v. Escamilla*, 852 F.3d 474, 485 (5th Cir. 2017) (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). Plaintiffs cite no case in which law-enforcement officers successfully asserted third-party Fourth Amendment rights as a basis to enjoin state law. *Cf. Chi. Park Dist. v. Chi. Bears Football Club, Inc.*, No. 06C3957, 2006 WL 2331099, at *2 (N.D. Ill. Aug. 8, 2006) (municipal stadium owner lacked standing for a "vicarious assertion of a Fourth Amendment claim raised on behalf of Bears' game attendees who potentially might be searched in the future" under a new NFL policy). Nor can plaintiffs suggest that they will be financially liable for the alleged Fourth Amendment violations. SB4 provides that the State will

[24] ICE Policy 10074.2, supra n.23 (emphasis added).

[25] *Id.*

defend local entities in suits based on good-faith compliance with immigration detainer requests, and will indemnify liability for such compliance. *See supra* p. 9.

2. In any event, plaintiffs' argument that SB4 requires searches that violate the Fourth Amendment fails on the merits. SB4 merely codifies what the Supreme Court noted in *Arizona v. United States*: Congress has authorized federal immigration officials to take an alien into custody based on that alien's status as a removable alien, and States may cooperate with that effort under the instruction and guidance of federal officials. 567 U.S. at 408-11. Several plaintiffs' own policies implicitly recognize this authority by honoring ICE detainers when doing so suits their perceived local-law-enforcement goals. *E.g.*, ECF No. 58-1 (Hernandez Decl.) ¶ 26 (complying with ICE detainers not backed by a "judicial warrant or court order" if the detainers "concern individuals alleged to have committed certain serious crimes or based on my own discretion and judgment that it is appropriate to hold an individual"). SB4's provisions are wholly consistent with existing immigration-detention authority. And plaintiffs' arguments that SB4 deviates from that authority are mistaken.

a. Under the Immigration and Nationality Act, federal immigration officials "can exercise discretion to issue a warrant for an alien's arrest and detention 'pending a decision on whether the alien is to be removed from the United States.'" *Arizona*, 567 U.S. at 407 (quoting 8 U.S.C. § 1226(a)). Those warrants are executive warrants, not judicial warrants. Officials may also arrest an alien without an executive warrant if the alien is "'in the United States in violation of any [immigration] law or regulation,' . . . but only where the alien 'is likely to escape before a warrant can be obtained.'" *Id.* at 408 (quoting 8 U.S.C. § 1357(a)(2)). ICE detainers issue based on a federal immigration officer's "reason to believe" that an alien is removable, which means "probable cause" of removability. *E.g.*, *Morales v. Chadbourne*, 793 F.3d 208, 216 (1st Cir. 2015).

Plaintiffs cite no case holding that federal officials' ability to arrest for immigration violations without judicial warrants violates the Fourth Amendment. *See, e.g.*, San Antonio Mot. 31 (recognizing federal immigration-arrest statutory authority and requirements). Indeed, federal immigration arrests under this process "have the sanction of time." *Abel v. United States*, 362 U.S.

217, 230 (1960); *see also Roy v. Cty. of L.A.*, No. 2:12-CV-09012, 2017 WL 2559616, at *5 (C.D. Cal. June 12, 2017) ("[F]ailure to submit ICE officers' probable cause determinations for review by an immigration, magistrate, or federal district court judge is not unconstitutional."). Even though immigration enforcement is often considered a "civil" matter, removal proceedings contemplate the necessity of detention. *See, e.g.*, *Kim*, 538 U.S. at 523 (no-bail detention; "Court has recognized detention during deportation proceedings as a constitutionally valid aspect of the deportation process"); *Zadvydas v. Davis*, 533 U.S. 678, 697 (2001) (distinguishing "detention pending a determination of removability" from the question of authority to detain indefinitely). And, in the Court's Fifth Amendment alien-detention cases, the Court has explained that there is far more constitutional latitude with rules regarding pre-removal detention: "Congress regularly makes rules that would be unacceptable if applied to citizens." *Demore v. Kim*, 538 U.S. 510, 521 (2003) (quoting *Mathews v. Diaz,* 426 U.S. 67, 79-80 (1976)).[26]

Nothing in the INA limits the ability of "any officer or employee of a State or political subdivision of a State . . . to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." 8 U.S.C. § 1357(g)(10)(B). Thus, in *United States v. Quntana*, 623 F.3d 1237 (8th Cir. 2010), an arrest was lawful because a border-patrol agent had "probable cause to believe" that an alien was removable based on evidence obtained after a traffic stop, and that a state trooper "was authorized to assist

[26] The Fifth Circuit has also noted that "neither [it] nor the Supreme Court has held that the Fourth Amendment extends to a native and citizen of another nation who entered and remained in the United States illegally." *United States v. Portillo-Munoz*, 643 F.3d 437, 440 (5th Cir. 2011). More recently, the Fifth Circuit has explained that if Fourth Amendment claims are brought by "excludable aliens stopped before entry into the United States and their claims arise in the context of immigration, the entry fiction applies and there is no violation of the Fourth Amendment." *Castro v. Cabrera*, 742 F.3d 595, 600 (5th Cir. 2014). Under the entry fiction, mere physical presence on United States soil is insufficient to establish an alien's lawful admission to the country. "An alien present in the United States who has not been admitted or who arrives in the United States" is considered only an "applicant for admission." 8 U.S.C. § 1225(a)(1); *see Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 215 (1953) (noting that an alien at a port of entry "is treated as if stopped at the border"). In light of this background, it is doubtful that the Fourth Amendment applies to many aliens who would be subject to ICE detainers enforced under SB4. For example, aliens who entered unlawfully and are removable on that basis because their unlawful presence makes them inadmissible upon detection by immigration authorities. *See* 8 U.S.C. § 1182(a)(6)(A)(i).

[the agent] in detaining [the defendant]" under § 1357(g)(10)(B). *Id.* at 1241-42. Local law-enforcement officials provide analogous support to federal-immigration authorities in complying with ICE detainers. *Cf. Arizona*, 567 U.S. at 410 (disapproving of *unilateral* state-immigration enforcement). And it is well-recognized that local law-enforcement officers may execute facially valid process. *Mays v. Sudderth*, 97 F.3d 107, 113 (5th Cir. 1996) (nonimmigration court order); *Duckett v. City of Cedar Park*, 950 F.2d 272, 280 (5th Cir. 1992) (nonimmigration warrant); *Chavez v. City of Petaluma*, 2015 WL 6152479, at *6, 11 (N.D. Cal. Oct. 20, 2015) (nonimmigration parole hold); *Puccini v. United States*, 1996 WL 556987, at *1 (N.D. Ill. Sept. 26, 1996) (nonimmigration federal-custody detainer).

ICE detainers, at most, ask local law enforcement to continue an alien's detention *up to* 48 hours past the point he would otherwise be released. Plaintiffs acknowledge that, under ICE policy at the time SB4 was enacted, a federal immigration detainer request comes in the form of a DHS "Form I-247 document or a similar or successor form," SB4 § 1.02 (§ 772.0073(a)(2)), that issues upon "reason to believe" that an alien is removable, and supported by an immigration warrant, which is a warrant issued by a federal immigration official indicating either the basis on which there is reason to believe the alien is removable or that the alien has been adjudged removable, *see supra* p. 49. That finding is the equivalent of "probable cause" of removability to conduct an immigration detention. *E.g.*, *Morales*, 793 F.3d at 217. Plaintiffs do not dispute that these steps comport with current immigration-arrest requirements.

A local law enforcement officer receiving such a detainer thus receives personal or collective knowledge that there is probable cause that an alien is removable. For example, the officer might learn that the alien is subject to a removal order. *See People v. Xirum*, 993 N.Y.S.2d 627, 630 (Sup. Ct. 2014) (probable cause on that basis).[27] "[I]t is not necessary for the arresting officer

[27] Under the Immigration and Nationality Act, local law-enforcement agencies can also contract with federal immigration officials to undertake specific immigration-enforcement duties. *See* 8 U.S.C. § 1357(g), and one of those duties is to execute immigration warrants, *see* 8 C.F.R. § 287.5(e)(3). According to ICE, currently three county sheriffs' departments and one city police department within Texas have such explicit agreements and thus authority to actually *execute* the warrants that accompany ICE detainers.

to know all of the facts amounting to probable cause, as long as there is some degree of communication between the arresting officer and an officer who has knowledge of all the necessary facts." *United States v. Ortiz*, 781 F.3d 221, 228 (5th Cir. 2015); *see also United States v. Ibarra*, 493 F.3d 526, 530 (5th Cir. 2007) ("collective knowledge" doctrine supported search of tractor trailer where requesting officer asked other police only "to monitor the vehicle" but also said that it was "carrying a load of narcotics").

In light of these steps, SB4 merely requires that local officials comply with federal immigration detainer requests that are backed by a finding of probable cause by a federal official and are consistent with the Fourth Amendment. Plaintiffs acknowledge this, but claim that it is "too early to know how many errors will occur." El Cenizo Mot. 32 n.10. That alone is reason to deny plaintiffs' motion, as it shows that SB4 is not *facially* invalid in all its applications.

b. Plaintiffs identify no "across-the-board" violation that would justify facially enjoining SB4's detainer provisions. Plaintiffs claim that detention will violate the Fourth Amendment when issued without probable cause. El Cenizo Mot. 31. But under current ICE policy, detainers will issue *only* upon a finding of probable cause. *See supra* pp. 48-49. Several cases that plaintiffs cite (El Cenizo Mot. 31), including *Morales v. Chadbourne*, No. 12-301-M-LDA, 2017 WL 354292, at *5-6 (D.R.I. Jan. 24, 2017), and *Miranda-Olivares v. Clackamas Cty.*, No. 3:12-cv-02317-ST, 2014 WL 1414305, at *11 (D. Or. Apr. 11, 2014), dealt with prior ICE detainer forms that merely stated that DHS had "initiated an investigation" to determine whether she was removable. Under current ICE policy, that would not be enough for a detainer to issue, as probable cause is now required. And even if it were true that "ICE detainers do not always meet Fourth Amendment requirements of probable cause" (El Paso Mot. 31 n.33 (citing *Trujillo Santoyo v. United States*,

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USICE, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, https://www.ice.gov/factsheets/287g (last visited June 16, 2017); *e.g.*, Jackson Cty. Sheriff's Office Memorandum of Agreement, App. D at 16, https://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/jacksoncounty.pdf (granting "[t]he power and authority to serve warrants of arrest for immigration violations pursuant to 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.5(e)(3)").

No. 5:16-cv-00855, slip op. 12 (W.D. Tex. June 5, 2017)), cases in which ICE detainers are backed by probable cause are fatal to plaintiffs' claim that SB4 is facially invalid.

Plaintiffs claim that "informal detention requests" may be improper if they are unwritten and "not expressly time-limited," but that bucks existing ICE policy and any defect is the result of the detainer, not SB4. El Cenizo Mot. 31.[28] Finally, as discussed above, ICE's past alleged "fail[ures] to comply with the INA's warrantless arrest provision" are irrelevant to plaintiffs' motion since ICE has changed its policy and no longer issues detainers without immigration warrants. *See supra* p. 49.

SB4's exception for citizens or individuals who provide proof of lawful status is irrelevant to plaintiffs' challenge. El Cenizo Mot. 32-33. Whether a person is able to "affirmatively prove their immigration status" (*id.* at 32) is also irrelevant since local officials can avoid SB4 liability by complying with the detainer, using *ICE*'s determination about removability. That the exception does not "prevent detentions from lasting longer than 48 hours" is irrelevant since ICE provides that detainer requests expire at 48 hours. *See* ICE Policy 10074.2, *supra* n.23, ¶2.7.

c. Disparities between *criminal* probable-cause requirements and *immigration-enforcement* probable-cause requirements do not require a different result. *See, e.g.*, San Antonio Mot. 31 (arguing that SB4 requires compliance with ICE detainers that are not based on probable cause of a *crime* (citing *Santoyo*, *supra*, slip op. 13)). Several courts have erroneously ruled that federal ICE detainers are backed by inadequate probable cause, reasoning that warrantless arrests cannot be premised on probable cause of a civil offense. *E.g.*, *Mercado v. Dallas Cty.*, 2017 WL 169102, at *6 (N.D. Tex. Jan. 17, 2017) (citing nonimmigration cases for the proposition that suspicion of

[28] Plaintiffs also fail to justify their assertion that SB4 requires compliance with "informal" detainer requests "such as a phone call." El Cenizo Mot. 31; *accord* San Antonio Mot. 31. The statutory text refers to "immigration detainer requests" as "including a United States Department of Homeland Security Form I-247 document or a similar or successor form." SB4 § 1.02 (§ 772.0073(a)(2)). In that context, "detainer requests" refers to immigration detainer requests through other types of forms. *See United States v. Golding*, 332 F.3d 838, 844 (5th Cir. 2003) (per curiam) (*noscitur a sociis* canon). For this reason, the El Paso's argument that "immigration detainer requests" is unconstitutionally vague (El Paso Mot. 26) also fails.

commission of civil offense insufficient to support Fourth Amendment criminal arrest); *see also Santoyo*, *supra*, slip op. 12, 15. That theory is wrong for at least three reasons.

First, warrantless arrests can be made for non-criminal conduct. It is well-established that "[l]awful warrantless arrest is not necessarily limited to those instances in which the arrest is made for criminal conduct." 3 Wayne LaFave et al., *Search and Seizure* § 5.1(b) (5th ed. 2012) (listing examples, including arrests for incapacitation due to intoxication, arrests of mentally ill individuals for medical evaluation, and returning runaway juveniles to their parents).

The Supreme Court's observation in *Arizona v. United States* that typically "it is not a crime for a removable alien to remain present in the United States" is not to the contrary. 567 U.S. at 407 (citing *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984)). Unlike in *Arizona*, SB4 does not authorize freestanding authority to arrest for civil immigration violations, but merely ensure that officials cooperate with detentions under the express direction of federal immigration officials. That result comports with *Arizona*'s endorsement of cooperation under the guidance of federal officials, as well as Fifth Circuit precedent. *See, e.g.*, *Mays*, 97 F.3d at 113 (authority to comply with facially valid court order); *Duckett*, 950 F.2d at 280 (authority to comply with facially valid warrant).[29] Moreover, *Arizona* ruled on preemption grounds that did not strip state officials of their ability to constitutionally detain removable aliens consistent with the Fourth Amendment. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 328-32 (2001) (noting constables' common law inherent authority to arrest); *United States v. Phillips*, 834 F.3d 1176, 1181 (11th Cir. 2016); *accord Locke*

[29] *Arizona* also suggested that a detention for purposes of *investigating* an alien's immigration status would raise Fourth Amendment concerns. 567 U.S. at 413 ("Detaining individuals solely to verify their immigration status would raise constitutional concerns."); *see also Cervantez v. Whitfield*, 776 F.2d 556, 559-60 (5th Cir. 1985) (reciting federal immigration authority's stipulation that "local law enforcement agencies do not have authority to question, arrest, or detain persons solely on the grounds that they may be deportable aliens" but recognizing local law enforcement's ability "to detain a person for INS for possible future proceedings under the immigration laws" upon request). In contrast, under SB4, the ICE-detainer 48-hour hold is not an investigatory detention, but based on probable cause that the alien *is in fact* removable, and at the express direction of ICE to hold the alien. The San Antonio plaintiffs cite *Arizona* and *Cervantez* for the proposition that "detention pursuant to an ICE detainer requires either probable cause to believe that a criminal offense has been or is being committed or a warrant." San Antonio Mot. 30. But neither case stands for that proposition. *See Arizona*, 567 U.S. at 413; *Cervantez*, 776 F.2d at 560.

v. United States, 11 U.S. (7 Cranch) 339, 348 (1813) ("probable cause" meant a belief "made under circumstances which warrant suspicion," without distinguishing criminal and civil offenses). Detention by state officials for immigration offenses is not inherently invalid.

Indeed, the alternative to the uniformity provided by SB4 would leave in place the sort of selective ICE detainer compliance policies like that of Travis County Sheriff Hernandez. Those policies impermissibly allow a local entity to "achieve its own immigration policy" by deciding to decline certain ICE detainers on the theory that some immigration-enforcement guidance from federal officials should be ignored in favor of localities' other policy goals. *Arizona*, 567 U.S. at 408. Policies that do so are not "fully compliant with . . . federal law and [ICE] guidance." ECF No. 58-1 (Hernandez Decl.) ¶ 33. Instead, such local policies reflect the sorts of "unilateral decisions" regarding immigration enforcement that the *Arizona* Court rejected. 567 U.S. at 410.

Second, the criminal/civil distinction misperceives the contextual nature of the probable-cause analysis. Terms like "'reasonable suspicion' and 'probable cause' . . . are commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (citation and quotation marks omitted). "It is not consistent with this principle to determine the reasonableness of an arrest based solely upon the arresting officer's technical compliance with state or local law." *United States v. Laville*, 480 F.3d 187, 196 (3d Cir. 2007). If the Constitution allows Congress to authorize *federal* immigration officials to take aliens into custody based on civil removability grounds, then it makes no difference for Fourth Amendment purposes whether state officials carry out the first 48 hours of that detention at the behest of the federal government. A contrary result would allow arrests by federal officials but not if conducted by state law-enforcement officers at their behest under identical circumstances. The Fourth Amendment contains no such illogical requirement. *See id.* at 193.

Third, any number of scenarios could allow criminal probable cause determinations consistent with SB4 if federal immigration officials share with local officials information establishing that the detainee has committed a criminal immigration violation. *See, e.g.*, *Santoyo*, *supra*, slip

op. 12. Plaintiffs are thus wrong that SB4 necessarily requires seizures that lack probable cause, *e.g.*, El Paso Mot. 30-31, and that SB4 "ensures ongoing unconstitutional conduct," San Antonio Mot. 32.

3. Given these points, plaintiffs cannot show that SB4's detainer provision is facially invalid. Fourth Amendment facial challenges are among "the most difficult . . . to mount successfully," *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). SB4 does not "forbid[] officers from undertaking [a] particularized assessment" of probable cause. El Cenizo Mot. 33. That makes plaintiffs' reliance on *Patel* unpersuasive since, in that case, the statute at issue actually authorized a warrantless search of hotel owners' records. 135 S. Ct. at 2448, 2452-53. Rather, this is like the Fourth Amendment argument based on a constitutional "implication" in *Hoffman Estates*—in which certain recordkeeping requirements theoretically could have led to searches of individuals who had purchased legal drug paraphernalia—which was an inadequate basis for a pre-enforcement facial challenge. 455 U.S. at 504 n.22. But plaintiffs have not demonstrated that SB4 "is being employed in such an unconstitutional manner" to punish municipalities who decline to conduct unlawful seizures. *Id.*

That SB4 imposes certain penalties for noncompliance with detainer duties does not support plaintiffs' pre-enforcement facial challenge since plaintiffs can avoid SB4 liability by complying. Plaintiffs are not being forced to "bet the farm" on choosing the violative conduct before challenging SB4, El Cenizo Mot. 34. SB4's detainer penalties require scienter,[30] and SB4 provides for defense and indemnification from the Texas Attorney General for liability based on good-faith

[30] Plaintiffs are wrong that "a sheriff who instructed a deputy on a single occasion, based on a mistaken immigration status determination, not to honor a detainer would be subject to removal from office" because "sheriffs may not prohibit deputies from 'providing enforcement assistance.'" El Cenizo Mot. 33 (SB4 § 1.01 (§ 752.053(b)(3))). That argument treats new § 752.053(a)(3)'s separate prohibition on violating the detainer mandate as surplusage. The more-specific prohibition on "intentionally violating" the duty to honor ICE detainers should control over the less-specific prohibition on blocking employees from "providing enforcement assistance." *See, e.g.*, *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) ("[A] specific statute controls over a general one.").

compliance with an immigration detainer request. *See supra* p. 9; *cf.* San Antonio Mot. 9 (describing SB4's detainer-related penalties without mentioning SB4's scienter requirement or the Attorney General's duties to defend and indemnify).

B. The Austin plaintiffs' additional arguments are unavailing; SB4 does not require investigatory detentions or extended law-enforcement encounters.

Austin asserts that it does not receive ICE detainer requests, and therefore "has no method [to] determine whether people it detains may be the subject of such requests." Austin Mot. 9. Austin's chief of police states his officers "could detain a person (e.g., for a traffic infraction), release that person with a citation, and never know that the person was the subject of an ICE detainer request." ECF No. 57-04, ¶ 19. But SB4 does not require prolonged or investigatory detentions and thus the Austin plaintiffs' arguments fail. SB4 does not require such an affirmative investigation into whether an alien is subject to an ICE detainer. *See supra* p. 6. Current ICE policy also provides that detainer requests will not issue "for an alien who has been temporarily detained or stopped, but not arrested." *See* ICE Policy 10074.2, *supra* n.23, ¶2.5.

Austin also argues that giving officers "discretion on whether and when to inquire into a detainee's or arrestee's immigration status violates the Fourth Amendment's protection against unreasonable seizures." Austin Mot. 13. Being asked a question is not a "seizure" for Fourth Amendment purposes, since it does not result in an additional period of detention and thus cannot be a Fourth Amendment violation. *Muehler v. Mena*, 544 U.S. 93, 101 (2005) (citing *Florida v. Bostick*, 501 U.S. 429, 434-35 (1991)). The Austin plaintiffs argue that extending a traffic stop beyond the time needed to determine whether to write a citation or further investigate criminal activity violates the Fourth Amendment and that, under SB4, Austin "could not prohibit officers from prolonging a stop by inquiring into immigration status." Austin Mot. 15. But SB4 does not require immigration-status investigation—it merely provides that local law enforcement agencies cannot prohibit such inquiries where they are otherwise consonant with the Fourth Amendment. *See supra* pp. 38-39. In any event, the Austin plaintiffs are wrong that their pre-enforcement Fourth Amendment challenge is ripe for review now (Mot. 15 n.7), as Austin still ultimately seeks to

assert vicarious Fourth Amendment violations against third parties based on future police conduct. *See supra* p. 49.

C. The San Antonio plaintiffs' attempt to recast a Fourth Amendment claim as a Fourteenth Amendment due process claim also fails.

The San Antonio plaintiffs also argue (Mot. 43-46) that SB4's detainer mandate violates substantive and procedural due process rights under the Fourteenth Amendment. Specifically, they argue that SB4 subjects individual members of several plaintiff organizations "to the arbitrary deprivation of physical liberty without adequate cause" and denies a procedural due process right to be heard "'at a meaningful time and in a meaningful manner'" San Antonio Mot. 43 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971)). Those arguments are foreclosed by plaintiffs' Fourth Amendment arguments. *See supra* Part VI.A.

Where there is a specific "source[ ] of constitutional protection against . . . governmental conduct," the "claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized . . . standard" judicially created from the Fourteenth Amendment. *Graham v. Connor*, 490 U.S. 386, 394 (1989); *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975). This applies to substantive due process claims. *Graham*, 490 U.S. at 394. "*Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997). This principle also applies to procedural due process claims. In *Gerstein*, the Court rejected a procedural due process challenge to pretrial detention procedures because it was foreclosed by the Fourth Amendment, holding that "[t]he Fourth Amendment …always has been thought to define the 'process that is due' for seizures of person or property in criminal cases, including the detention of suspects pending trial." 420 U.S. at 125 n.27; *see also Reynolds v. New Orleans City*, 272 F. App'x 331, 338 (5th Cir. 2008) (per curiam); *Becker v. Kroll*, 494 F.3d 904, 919 (10th Cir. 2007); *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005). That the Fourth Amendment is incorporated against the states through the Fourteenth

Amendment does not mean that plaintiffs have independent Fourteenth Amendment claims here. *See* San Antonio Mot. 44 (citing *Santoyo*, *supra*, slip op. 18 (W.D. Tex. June 5, 2017)).

Furthermore, the San Antonio plaintiffs' procedural due process claim is duplicative of their Fourth Amendment claim. *See* San Antonio Mot. 44-46. This claim rest on the argument that "SB4 poses a significant risk of erroneously depriving Plaintiffs' members of [a] fundamental liberty interest" because "an individual who is ordered released by a judge at a hearing might nevertheless be detained pursuant to SB4 without probable cause simply because federal immigration authorities issue a detainer request." *Id.* at 45. Even in the criminal context, a new arrest does not violate the Fourth Amendment provided a neutral magistrate determines probable cause within 48 hours of an arrest. *See Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). As several plaintiffs argue, because the detainer is the equivalent of a new arrest, *e.g.*, El Cenizo Mot. 31, the 48-hour window would run from the time the detainee would have otherwise been released from local-law-enforcement custody. The violation, if any, would arise after that time, after the individual is already in federal custody or the detainer request has been allowed to expire. *See* ICE Policy 10074.2, *supra* n.23, ¶ 2.7 (providing that detainer requests that seek extended detention must be cancelled after 48 hours). SB4's protections, rather than being inadequate or "wholly preempted" (San Antonio Mot. 45) comport with federal immigration-arrest authority and require no more. Contrary to the assertion that the state lacks an interest in SB4's subject (San Antonio Mot. 45-46) the INA recognizes states' vital function in immigration enforcement, *see supra* pp. 12-13, 26-27.

VII. Equal Protection of the Law Is Promoted, Not Denied, by SB4.

SB4 does not "deny to any person within [the State's] jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1; *cf.* El Cenizo Mot. 34-38. To the contrary, by limiting local officials' refusal to cooperate with the enforcement of federal immigration law, SB4 *promotes* across the State of Texas the equal protection of the laws.

A. Two sets of plaintiffs do not raise a conventional equal-protection challenge but instead rely on inapposite political-process case law.

Two sets of plaintiffs—the El Cenizo plaintiffs and the Travis County plaintiffs—do not raise a conventional equal-protection challenge. They do not attempt to show that the facially race-neutral SB4 is pretext masking a purposeful classification of individuals based on race. *Compare Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (describing such a challenge), *with* El Cenizo Mot. 34-38 (not even attempting an *Arlington Heights* analysis), *and* Travis Cty. Mot. 1-2 (merely adopting the El Cenizo plaintiffs' equal-protection argument). That strategy is sound. SB4 applies evenly to all officials; it does not address race other than to prohibit unconstitutional racial discrimination. SB4 § 1.01 (§ 752.054).

Instead of pressing the baseless argument that SB4 is purposeful treatment of individuals according to race, these El Cenizo and Travis County plaintiffs rely on equal-protection cases about state laws that alter the political process. *See* El Cenizo Mot. 35-37 (citing *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982), and *Reitman v. Mulkey*, 387 U.S. 369 (1967)); *cf., e.g.*, *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1648 (2014) (Scalia, J., concurring) (noting that the plaintiffs resorted to this line of authority because the district court found their claim "doom[ed]" under "conventional equal protection" doctrine) (brackets in original; quoting district court opinion). The San Antonio plaintiffs join in this argument. San Antonio Mot. 41-42 & n.67.

But these political-process cases do not apply because their predicate is absent here—SB4 does not change the political process in a way specific to the issue of race discrimination

1. In *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1631-34 (2014), the Supreme Court reviewed its three prior "political process" cases and their limits. In the first such case, a state constitutional amendment was held invalid because it "expressly authorized and constitutionalized the private right to discriminate" racially in housing decisions. *Id.* at 1631 (quoting *Mulkey*, 387 U.S. at 376). In the second such case, a city charter was held invalid because it "singl[ed] out antidiscrimination ordinances" for a new requirement of approval by referendum,

thus "alter[ing] the procedures of government to target racial minorities." *Id.* at 1632 (discussing *Hunter v. Erickson*, 393 U.S. 385 (1969)). In the final such case, a state initiative was held invalid because it "explicitly used the racial nature of a decision" to require a different political process for deciding the issue. *Id.* at 1633 (quoting *Seattle*, 458 U.S. at 470) (brackets omitted). In *Schuette*, the Court then rejected "the broad reading" of these cases and explained how they govern only a narrow class of state actions "with a racial focus." *Id.* at 1634.

2. These "political process" cases are simply inapposite here because their predicate is absent—singling out the matter of *race discrimination*, as opposed to some other matter, for a change in the political process. *Cf. Seattle*, 458 U.S. at 474 (state initiative altered power to "address a racial problem—and only a racial problem"); *Hunter*, 393 U.S. at 391 (city-charter amendment applied only to antidiscrimination ordinances); *Mulkey*, 387 U.S. at 376 (constitutional amendment "expressly authorized and constitutionalized the private right to discriminate"). Unlike those cases, SB4 does not single out race discrimination for changes in the political process. SB4 concerns immigration-law enforcement.

Accordingly, plaintiffs' political-process claim necessarily argues that a state law curtailing local power on a matter other than race is unconstitutional whenever local officials themselves have enacted or may enact policies addressing perceived racial discrimination in that context. El Cenizo Mot. 34-36. That is a sweeping theory far beyond anything the Supreme Court has endorsed. *See Crawford v. Bd. of Educ. of Los Angeles*, 458 U.S. 527, 537, 540-41 (1982) (holding that *Hunter's* political-process theory is inapplicable where "Proposition I does not embody a racial classification" and "a discriminatory purpose" was not shown). Indeed, that untenable theory could invalidate state laws affecting the intra-state political process on any number of topics, such as laws seeking statewide uniformity in criminal-law enforcement methods. Unless a state law "singl[es] out" discrimination protections for a change in the political process, and thus "raises dangers of impermissible motivation," *Seattle*, 458 U.S. at 486 n.30, the political-process cases cited by plaintiffs are inapplicable..

3. Relying on these political-process cases would be particularly misguided here because local bans on racial profiling are not prohibited even *incidentally* by SB4 (much less singled out). Plaintiffs argue that, incident to its regulation of local cooperation in immigration-law enforcement, SB4 "wipes out" local authority to address racial profiling. El Cenizo Mot. 35. Not so.

Local bans on racial profiling are not prohibited by SB4. SB4 itself bans unconstitutional racial discrimination. SB4 § 1.01 (§ 752.054). And preexisting Texas law specifically bans police from racial profiling. Tex. Code Crim. Proc. art. 2.13 ("A peace officer may not engage in racial profiling."); *id.* art. 3.05 ("'racial profiling' means a law enforcement-initiated action based on an individual's race, ethnicity, or national origin").

Texas law then affirmatively *commands* local law-enforcement agencies to adopt policies that "strictly prohibit peace officers employed by the agency from engaging in racial profiling." *Id.* art. 2.131. And Texas law directs that law-enforcement officials submit agency-wide reports on racial-profiling complaints and specified statistics, *id.* arts. 2.133-.134, and undergo training on racial profiling, Tex. Educ. Code § 96.641(a)-(d), (k); Tex. Occ. Code § 1701.253(h).

SB4 does not address local policies and actions on racial profiling and cannot plausibly be read to prohibit them. A local policy that merely restates and reinforces preexisting limits on officer conduct is not a "material" limit, much less a limit that concerns immigration law as opposed to general police conduct. *See supra* p. 30. Plaintiffs' view would mean that SB4 prohibits local policies and actions that state law elsewhere *affirmatively commands* and that are *never mentioned* in SB4. Plaintiffs do not even try to square that peculiar view with the demanding standard for finding repeal by implication. *E.g.*, *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990) ("Such statutory repeals by implication are not favored. A legislative enactment covering a subject dealt with by an older law, but not repealing that law, should be harmonized whenever possible with its predecessor in such a manner as to give effect to both.").

Because local bans on racial profiling are not displaced even as an incident of SB4 (much less singled out for special unfavorable treatment), equal-protection cases about changing the political process solely for the issue of race discrimination are particularly unavailing here.

4. Finally, plaintiffs invoke *Romer v. Evans*, 517 U.S. 620 (1996). El Cenizo Mot. 37; San Antonio Mot. 41 n.67. *Romer* invalidated a state constitutional amendment that prohibited all state and local laws to protect homosexual persons against discrimination. 517 U.S. at 624. *Romer* held that amendment invalid upon finding no rational basis, but rather sheer animus, behind the amendment's singling out and prohibiting of discrimination protections for a disfavored class of persons. *Id.* at 633.

Romer is wholly inapplicable here. SB4 does not single out or prohibit bans on discrimination protecting any characteristic—race, color, national origin, alienage, or otherwise. Quite the opposite: SB4 *prohibits* unconstitutional discrimination on these bases. SB4 § 1.01 (§ 752.054). A law that does not single out discrimination bans for special treatment—and that affirmatively prohibits unconstitutional discrimination—does not run afoul of the Equal Protection Clause as applied in *Romer*. *See, e.g.*, *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997) ("A law that prohibits the State from classifying individuals by race . . . a fortiori does not classify individuals by race."), *approved in Schuette*, 134 S. Ct. at 1636.

B. The claim that SB4 is purposeful discrimination based on race is meritless.

The Austin, El Paso, and San Antonio plaintiffs challenge SB4 as a pretext for purposeful discrimination among individuals on account of race. Austin Mot. 15-17; El Paso Mot. 3-20; San Antonio Mot. 37-42. That argument is meritless.

1. A facial challenge requires showing that a classification in the disputed law is pretext for intentional differential treatment according to race.

"The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington v. Davis*, 426 U.S. 229, 239 (1976). An equal-protection claim thus requires proof of a "racially discriminatory intent or purpose" for challenged state action. *Arlington Heights*, 429 U.S. at 265. In the case of a legislative enactment, that means an institutional decision "to discriminate on the basis of race."

Feeney, 442 U.S. at 260. A law that "neither says nor implies that persons are to be treated differently on account of their race" is not a racial classification. *Crawford*, 458 U.S. at 537.

Plaintiffs bring a facial challenge to SB4, asserting that the law itself denies equal protection and should be enjoined. *E.g.*, Austin Mot. 15; El Paso Mot. 1; San Antonio Mot. 38. It is essential to understand the proper focus of such a facial challenge. It is not enough to imagine some abstract legislative motive or ill will. A law can be facially invalidated as purposeful racial discrimination only if the law itself contains a "racial classification" or "a classification that is ostensibly neutral but is an obvious pretext for racial discrimination." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, at 272 (1979). As the Court held in *Feeney*: "In assessing an equal protection challenge, a court is called upon *only* to measure the basic validity of *the legislative classification*." *Id.* (emphases added). Or as the Court held in *Palmer v. Thompson*, 403 U.S. 217 (1971), without an invidious legislative classification of individuals, state action cannot be nullified "solely because of the motivations of the [legislators] who voted for it." *Id.* at 224.

In contrast, many of plaintiffs' complaints are not with any classification drawn by SB4. Plaintiffs devote attention to how federal officials might enforce immigration law, or how local officials might use their authority under SB4 to cooperate with those federal officials. *E.g.*, El Paso Mot. 6-8; San Antonio Mot. 41; Austin Mot. 16-17. Central is plaintiffs' speculation that "Latinos will be profiled and disparately affected" by federal or state law-enforcement officers, and that this was intended by SB4 (despite SB4's and preexisting Texas law's ban on unconstitutional profiling). El Paso Mot. 7.

Those complaints cannot invalidate SB4. If future enforcement activity by federal or local officers is alleged to discriminate based on race, that activity can itself be challenged and declared unlawful. *E.g.*, *Batson v. Kentucky*, 476 U.S. 79, 83-84 (1986) (successful challenge to particular use of preemptory strikes); *Arlington Heights*, 429 U.S. at 269 (unsuccessful challenge to particular use of zoning authority). But SB4 does not direct any such unlawful enforcement practices. To the contrary, it prohibits them. SB4 § 1.01. Nothing in SB4 blocks local policies against "unlawful profiling," San Antonio Mot. 39—local policies that Texas law in fact *requires*. *See supra* pp. 7-

8. Plaintiffs' complaints about hypothetical race-based enforcement practices are not complaints about any classification drawn by the Legislature in SB4. And a facial challenge to a law must challenge the nature of "the legislative classification," *Feeney*, 442 U.S. at 272, a principle that plaintiffs' purpose argument repeatedly ignores.

Here, the only the legislative classification identified by plaintiffs is that SB4 addresses the topic of immigration-law enforcement, including against persons under lawful detention, arrest, or criminal sentence, SB4 §§ 1.01, 2.01, as opposed to some non-immigration topic. Austin Mot. 16; El Paso Mot. 2-3; San Antonio Mot. 40-41. That legislative classification, to the extent it concerns individuals at all, turns on whether an individual is the subject of federal immigration-law enforcement or has been lawfully detained or arrested on suspicion of crime. That legislative classification does not mention race. Nor is it "an obvious pretext," *Feeney*, 442 U.S. at 272, for a classification by race, as explained below. And that legislative classification is the only classification at issue in plaintiffs' facial challenge to SB4.

2. A disparate racial impact does not show that a law is a racial classification, but plaintiffs have not even shown a relevant disparate impact.

Plaintiffs argue that SB4 will have a disparate impact across racial groups. This assertion largely ignores the standard governing their facial challenge by drawing on speculation about hypothetical officials' future conduct, rather than focusing on the legislative classifications in SB4 itself. *See supra* Part VII.B.1. In any event, the "Fourteenth Amendment guarantees equal laws, not equal results." *Feeney*, 442 U.S. at 273. Yet plaintiffs have not shown a relevant disparate impact across racial groups of the undisputedly permissible distinctions drawn in SB4.

a. Plaintiffs argue that SB4's alleged "disparate impact violates the Equal Protection Clause." El Paso Mot. 1. But the Supreme Court has never "held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another." *Davis*, 426 U.S. at 242. A law's disparate racial impact is not a constitutional violation.

The Equal Protection Clause does not prohibit "a statute or ordinance having neutral purposes but disproportionate racial consequences." *Id.* at 243. Indeed, this is the only sound rule, as the Court has explained: "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes." *Id.* at 248.

Hence, the Supreme Court has cautioned against transforming the foreseeability of disparate impact from mere "inference" into "proof" of a legislative intent to pass a "neutral rule" *because* of that impact as opposed to reasons that have "always been deemed to be legitimate." *Feeney*, 442 U.S. at 279 & n.25. Accordingly, *Davis* upheld an employment test that white applicants passed in proportionately greater numbers than did another racial group, where the plaintiffs failed to show that racial discrimination entered into the formulation of the test. 426 U.S. at 245-47. Similarly, *Arlington Heights* upheld a zoning decision denying permission to build low- and moderate-income housing projects because there was no evidence that the decision was pretext for discrimination based on race. 429 U.S. at 269-71. And *Feeney* upheld an employment preference for veterans, despite its substantial disparate impact on the basis of sex (as veterans are disproportionately men), because nothing showed that the preference was devised or reenacted to harm women's job prospects, even if the state legislature was aware that the veterans preference would disproportionately benefit men. 442 U.S. at 279. In short, rational classifications like those in *Davis*, *Arlington Heights*, and *Feeney* are upheld notwithstanding a disparate effect unless a challenger can show that the classification "can plausibly be explained only as a [race]-based classification," *id.* at 275, and is thus "obvious pretext," *id.* at 272.

b. Plaintiffs' disparate-impact argument is also flawed factually. First, the El Paso plaintiffs focus on (Mot. 6) SB4's requirement that law-enforcement officers may not be prohibited from inquiring about the immigration status of a person under "lawful detention or under arrest." SB4 § 1.01 (§ 752.053(b)(1)). The El Paso plaintiffs suggest that this prohibition (which is just a concrete example of the general prohibition in § 752.053(a)) disparately affects "Latinos in

Texas." El Paso Mot. 5. But plaintiffs have not shown that members of any racial group in Texas is "lawfully detained" or "arrested" out of proportion to their presence in the population. Indeed, suggesting the opposite, Senator Creighton pointed out in the Senate debate on SB4 that Hispanic motorists are *less* likely to be stopped relative to their population percentage, whereas Caucasian motorists are *more* likely to be stopped relative to their population percentage.[31] Likewise, although Senator Lucio expressed concerns about racial profiling during DPS stops, he clarified that he "[doesn't] have anything in [his] office to indicate that DPS has treated anyone in a disrespectful manner."[32] In short, plaintiffs have not shown that regulating about the conduct of "lawful detentions" and "arrests" somehow has a disparate racial impact.

Second, the El Paso plaintiffs argue that "Latino immigrants" would be "disproportionately affected" by SB4's provisions removing local bans on immigration-law enforcement. Mot. 7. Plaintiffs have not shown that. They have not offered evidence that Latino immigrants are subject to immigration-law enforcement in disproportion to their representation among immigrants.

And only that disparate impact could have any real probative force here. Plaintiffs fall back to the broader argument that immigration law disparately affects racial groups that are more prevalent in foreign countries than in this country, such as Hispanics. Austin Mot. 16; El Paso Mot. 7 (noting the assumption that most immigrants in Texas are Hispanic). The San Antonio plaintiffs go further and label as "disparate treatment" the inherently differential treatment of non-citizens and citizens under immigration law. San Antonio Mot. 40 (capitalization altered). Those points are entirely unprobative of an invidious purpose to deny equal protection of the law. It is undisputed that immigration law may "regulate the status of aliens," *Toll v. Moreno*, 458 U.S. 1, 10 (1982),

[31] Debate on Tex. S.B. 4 on the Floor of the Senate, 85th Leg., R.S., at 02:07:38-02:08:11 (Feb. 7, 2017, Part II) ("Hispanics make up 38.62% of the total Texas population yet only made up 26.2% of the DPS total vehicle searches, citations, and warnings . . . Caucasians, on the other hand, make up 43.5% of the total Texas population and were 47% of all DPS vehicle searches last year.") (available from http://www.senate.texas.gov/av-archive.php). Citation to legislative material is in Bluebook and Greenbook format, accounting for the fact that Texas legislative history is largely in video form.

[32] Enforcement by Certain Local Government Entities and Campus Police Departments of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the S. Comm. on State Affairs, 85th Leg., R.S., at 01:36:00-:08 (Feb. 2, 2017) (statement of Sen. Eddie Lucio, Jr.).

and thus distinguish between foreign citizens and U.S. citizens. The fact that racial groups more prevalent in foreign countries than in this country are subject to immigration law out of proportion to their representation in the U.S. is thus utterly unremarkable. Unless federal immigration law is deemed purposeful racial discrimination, this sort of "disproportionate impact" cannot plausibly "be traced to a purpose to discriminate on the basis of race," as required to carry persuasive weight in an equal-protection analysis. *Feeney*, 442 U.S. at 260.

3. The circumstantial evidence contemplated by *Arlington Heights* confirms that SB4 was not enacted to treat people differently based on race.

In *Arlington Heights*, after discussing the arguable disparate racial impact of a challenged zoning decision, the Supreme Court looked to circumstantial evidence to confirm that the decision was motivated by the proffered zoning policy and not a racial classification. 429 U.S. at 267-71. Likewise here. The legislative record, the background and sequence of events leading to SB4, and other circumstantial evidence all confirm that SB4 legitimately reflects the Legislature's race-neutral rational and is not pretext masking a purpose to treat individuals differently based on race.[33] Plaintiffs fall far short of showing that SB4 is "unexplainable on grounds other than race," *id.* at 266, and thus "obvious pretext," *Feeney*, 442 U.S. at 272.

Moreover, the Supreme Court has consistently recognized that government action is presumed valid, *e.g.*, *Sunday Lake Iron Co. v. Wakefield Twp.*, 247 U.S. 350, 353 (1918); that government actors are presumed to act in good faith, *Miller v. Johnson*, 515 U.S. 900, 916 (1995); and that a "presumption of regularity" attaches to official action, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926). In other words, there is a "heavy presumption of constitutionality" of

[33] Indeed, circumstantial evidence should not even be considered here because, not only have plaintiffs shown no relevant disparate impact, but SB4 facially *prohibits* unconstitutional racial discrimination. SB4 § 1.01; *see, e.g.*, *Crawford*, 458 U.S. at 544 n.31 ("Absent discriminatory effect, judicial inquiry into legislative motivation is unnecessary, as well as undesirable." (quoting *Brown v. Califano*, 627 F.2d 1221, 1234 (D.C. Cir. 1980))); *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 523 (9th Cir. 2011) ("failure to establish . . . discriminatory impact prevents any inference of intentional discrimination"); *see also Schuette*, 134 S. Ct. at 1648 (Scalia, J., concurring) ("any law expressly requiring state actors to afford all persons equal protection of the laws . . . does not—cannot—deny 'to any person ... equal protection of the laws,' U.S. Const. amend. XIV, § 1, regardless of whatever evidence of seemingly foul purposes plaintiffs may cook up in the trial court.").

facially neutral action serving a goal within a government's authority. *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990). The circumstantial evidence must be evaluated against these background presumptions.

a. The Legislature did not believe that SB4 discriminates based on race or allows local officials to do so.

In *Arlington Heights* and *Feeney*, the Supreme Court found that, despite a decisionmaker's awareness of disparate impact on a particular group, there was no showing of discriminatory intent in the formulation or adoption of the actions at issue. *Feeney*, 442 U.S. at 278-79; *Arlington Heights*, 429 U.S. 270-71. Here, not only is there no demonstrated disparity in the enforcement of immigration law or in the execution of lawful detentions or arrests, but the Legislature affirmatively believed and intended that SB4 would not allow racial discrimination.

The best evidence of this is SB4's text. SB4 explicitly prohibits unconstitutional discrimination on account of "race, color, religion, language, or national origin." SB4 § 1.01 (§752.054). Plaintiffs' rest their purpose argument on the notion that SB4 prohibits *local* policies against racial profiling. *See* San Antonio Mot. 40; El Paso Mot. 7-8. But that is wrong. As explained above, nothing in SB4 amends the preexisting Texas law that affirmatively *requires* local law-enforcement agencies to strictly prohibit racial profiling. *See supra* pp. 7-8 (citing Tex. Code Crim. Proc. art. 2.132).

Indeed, the Legislature relied on that preexisting law as a safeguard against racial profiling. Senator Perry, who was SB4's author, stated that he "[has] no intention whatsoever to pass any legislation that creates a situation that would increase . . . racial profiling."[34] Senator Creighton informed the Senate of the numerous prohibitions against and remedies for racial profiling in place at the state and federal level.[35] Senator Creighton also emphasized that incidents of racial profiling are rare, with only ten complaints against the Dallas Police Department reported in 2015, out of

[34] Sen. Floor Debate on S.B. 4, 85th Leg., R.S. (Feb. 7, 2017 Part II), at 02:00:58-02:01:11.

[35] *Id.* at 02:01:52-02:07:34 (citing, inter alia, Texas Code of Criminal Procedure arts. 2.131-.132).

713,048 "total documented [police] contacts."[36] Senator Perry accordingly noted, regarding potential racial profiling, that he "believe[s] in [law enforcement] officers better than that."[37]

No discriminatory purpose can be inferred from the Legislature's decision to rely on these conclusions rather than the unsupported speculation of political opponents seeking to thwart the law. The issue is not whether the Legislature was *correct* about the chance of hypothetical future racial profiling by police, when the Legislature did not *believe* that racial profiling was likely, *intended* that racial profiling be prohibited by existing laws on that subject, and *passed* an express prohibition on unconstitutional discrimination. Second-guessing the Legislature's belief that those protections are sufficient is antithetical to the "extraordinary caution" that courts must exercise in adjudicating claims that a State enacted a facially neutral classification on a permissible topic "on the basis of race." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (quoting *Miller*, 515 U.S. at 916).

Lastly, the El Paso plaintiffs misleadingly argue that racial profiling occurred on the House floor, after SB4's enactment, when Representative Rinaldi "call[ed] immigration enforcement agents to 'report' Latino protesters." El Paso Mot. 8. Plaintiffs omit a key detail: Representative Rinaldi acted after seeing protestors' signs proclaiming their unlawful presence. He did not "profile" protestors based on race; he took their statements about immigration status at face value.[38]

b. The events leading up to SB4 confirm that it was enacted for the law's stated purposes.

The Supreme Court has indicated that courts may look to "[t]he specific sequence of events leading up the challenged decision" to "shed some light on the decisionmaker's purposes." *Arlington Heights*, 429 U.S. at 267. The events leading up to SB4's adoption confirm that the Legislature genuinely stated its rationale: barring sanctuary-city policies to promote the rule of law and prevent crime by unlawfully present aliens.

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[36] *Id.* at 02:08:13-02:08:35.

[37] *Id.* at 01:30:12-14.

[38] Matt Rinaldi (@MattRinaldiTX), Twitter, https://twitter.com/MattRinaldiTX/status/869269896365998080 (recounting signs stating: "I am illegal and here to stay.").

The Legislature did not shift from showing no interest in sanctuary cities to suddenly enacting SB4. Rather, SB4 is part of sustained nationwide attention to the issue of sanctuary cities. A bill to end sanctuary-city policies was introduced two years ago in the 84th legislative session, but did not come to a vote. Tex. S.B. 185, 84th Leg., R.S. (2015). The issue subsequently entered the national spotlight in 2015, when a convicted criminal was released by the sheriff's department in San Francisco, despite an immigration detainer request, and killed Kate Steinle as she walked on the waterfront with her father.[39] That national attention prompted a congressional hearing on the threat to public safety from sanctuary-city policies,[40] as well as a bill ("Kate's law") to increase penalties for illegal reentry.[41] In 2016, a Member of Congress wrote the Attorney General to urge the Department of Justice to "work with State and local jurisdictions to change their illegal sanctuary policies,"[42] resulting in the Justice Department later that year notifying cities that their Justice Assistance Grants would be jeopardized for non-compliance with the Department's "JAG Sanctuary Policy Guidelines."[43] And in January 2017, the President signed an executive order noting: "Sanctuary jurisdictions across the United States willfully violate Federal law in an attempt to shield aliens from removal from the United States. These jurisdictions have caused immeasurable harm to the American people and to the very fabric of our Republic."[44] In short, concerns with sanctuary-city policies have been raised officials in state and federal government for years.

As shown, the Legislature's focus on local cooperation with immigration-law enforcement did not materialize out of thin air, as if a pretext masking some other purpose. The Legislature was

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[39] http://www.cnn.com/2015/07/03/us/san-francisco-killing-suspect-immigrant-deported/index.html

[40] Sanctuary Cities: A Threat to Public Safety, Hearing Before the H. Comm. on the Judiciary, Subcomm. on Immigration and Border Safety, 114th Cong., 1st Sess. (July 23, 2015), https://judiciary.house.gov/wp-content/uploads/2016/02/114-36_95632.pdf.

[41] H.R. 3011, 114th Cong. (2015).

[42] Letter from Hon. John A. Culberson to Attorney General Loretta E. Lynch (Feb. 1, 2016), https://culberson.house.gov/uploadedfiles/culberson_letter_to_attorney_general_lynch.pdf.

[43] U.S. Dep't of Justice, Office of Justice Programs Guidance Regarding Compliance with 8 U.S.C. § 1373, at 2 (July 7, 2016), https://culberson.house.gov/uploadedfiles/2016-7-7_section_1373_-_doj_letter_to_culberson.pdf.

[44] Executive Order 13,768, 82 Fed. Reg. 8799, 8799 (Jan. 25, 2017).

focused on an issue of sustained national attention. Indeed, the Legislature focused on the situation recently created by the Travis County Sheriff, who issued an officewide policy picking which crimes she concluded were serious enough to honor a federal request to temporarily detain an alien suspected or convicted of that crime for immigration authorities. Travis Cty. Sheriff's Office, Policy on Cooperation with U.S. Immigration and Customs Enforcement ¶ 2 (Feb. 1, 2017), https://www.tcsheriff.org/images/ICE_Policy.pdf. The Legislature was concerned with setting a uniform, statewide policy instead: "[Travis County Sherriff Hernandez] has labeled three offenses that she is willing to detain people for [at ICE's request]. Notably, what is not in those is rape, child pedophilia, and other offenses that are just as heinous and just as personal."[45]

Protecting the public against the possibility of such heinous crimes, committed by aliens who would otherwise be detained for immigration enforcement, is indeed a "credible legitimate policy rationale." El Paso Mot. 11. The issue before the Legislature was not the "crime rate among immigrants." El Paso Mot. 14. It was potential crime by individuals already confined on suspicion or conviction of crime. The Legislature could rationally and readily conclude that honoring detainer requests improves public safety, by keeping those individuals from committing more crime since they are transferred to federal officials for immigration law enforcement rather than returned to the street. To second guess the policy judgments of the Legislature would be antithetical to the "extraordinary caution" courts must "exercise . . . in adjudicating claims that a State has" enacted a facially neutral law "on the basis of race." *Easley*, 532 U.S. at 242.

Nevertheless, plaintiffs seek to minimize the Legislature's concern by noting that most ICE detainers have been complied with in Texas. El Paso Mot. 11-12. But the Travis County Sherriff had a written policy expressly contemplating compliance with detainers for aliens held on only certain charges. And the issue of sanctuary-city policies was a matter of national concern, as it only takes one crime to point out the stark consequences of releasing someone who would otherwise be detained. *See supra* p. 3.

[45] S. Cmm. Hrg. at 01:29:15-:30 (statement of Sen. Charles Perry).

Plaintiffs also seem to argue that the Legislature could not have truly been concerned with the rule of law since compliance with detainers is (in plaintiffs' view) unlawful. El Paso Mot. 12-13 (apparently referencing commandeering concerns). That argument is obtuse: plaintiffs are describing their own view, not the State's view. They cite no evidence that SB4's proponents believed that a State's voluntary decision that its officers will comply with ICE detainers is unlawful. That view was not held by the Legislature,[46] and it is incorrect on the merits. *See infra* Part IX.

Relatedly, SB4's legislative history does not show a "blatant disregard" for the rule of law by "requir[ing] a breach" of El Paso's settlement agreement purportedly requiring El Paso "not to enforce federal civil immigration laws." El Paso Mot. 13. Representative Ortega from El Paso originally sought an exemption for cities like El Paso "under settlement agreement not to enforce federal civil immigration laws" but ultimately *withdrew* that amendment after debate. ECF No. 56-4 (Rodriguez Decl.) ¶ 53. That was because El Paso's settlement agreement did not require complete abstention from immigration enforcement. As Representative Ortega explained, "El Paso County Sheriff Wiles, like the vast majority of sheriffs in the State of Texas, complies with federal detainer requests." H.J. of Tex., 85th Leg., R.S., S107 (2017).[47]

c. Historical background does not impugn SB4's purpose.

The Supreme Court in *Arlington Heights* suggested that "a series of official actions taken for invidious purposes" could evidence an invidious purpose for the action challenged. 429 U.S. at 267. This evidentiary source is limited, however. First, it is limited to actions taken by the decisionmaker whose action is under review. *See City of Mobile v. Bolden*, 446 U.S. 55 ,74 n.20 (1980)

[46] For instance, Representative Geren defended compliance with 48-hour immigration detainers as lawful. Enforcement by Campus Police Departments and Certain Local Governmental Entities of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the H. Comm. on State Affairs, 85th Leg., Reg. Sess., 01:11:23 (Tex. Mar. 15, 2017) (statement of Rep. Charlie Geren).

[47] Moreover, the Legislature was satisfied that, because SB4 does not require the El Paso County Sheriff to adopt a new policy *compelling* deputies to ask about immigration status, SB4 does not compel an activity that the settlement agreement precludes. Of course, deputies there may still be unable to ask about immigration status under the terms of the settlement, but that is not a policy adopted by the sheriff. *See* ECF No. 56-4 (Rodriguez Decl.) at Exh. 4 (settlement); H.J. of Tex., 85th Leg., R.S., S109 (2017) (reflecting Representative Geren's satisfaction that SB4 would not require violation of the settlement agreement).

(plurality op.); *Veasey v. Abbott*, 830 F.3d 216, 232 (5th Cir. 2016). Second, it is limited temporally: "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question." *Bolden*, 446 U.S. at 74 (plurality op.); *accord Veasey*, 830 F.3d at 232. Thus, discriminatory acts by local officials or by long-deceased legislators are irrelevant to this inquiry. *Contra, e.g.*, San Antonio Mot. 39 (citing decision issued over 60 years ago). Third, a relevant action must actually be discriminatory, not simply infirm on some other ground. *Contra, e.g.*, El Paso Mot. 10 (citing two cases not even about racial discrimination, but Fourth Amendment rights).

That leaves plaintiffs to rely on two rulings. El Paso Mot. 10 (citing rulings in *Perez v. Abbott* and *Veasey v. Abbott*); San Antonio Mot. 39 (same). Both of those cases involve election law (redistricting and voter ID, respectively), and not immigration law. Plus, both of those rulings are in cases with pending litigation, the State vigorously disputes those discriminatory-purpose findings, and the State will appeal those findings at the appropriate time (both cases remain pending before their respective district courts). Those rulings are not yet settled data points, and it would be wholly unfair to hold those non-final rulings against Texas where the State has not yet had full judicial process. Plaintiffs absolutely have not shown a history of racial discrimination "extend[ing] up until the present day." El Paso Mot. 10.

In contrast to the paucity of probative historical background evidence suggesting that a vast number of legislators drew SB4's neutral provisions about immigration-law enforcement as pretext for a racial classification, evidence affirmatively dispels any such notion. The Legislature has acted twice in recent years to prohibit racial profiling—requiring local law-enforcement agencies to adopt policies against it, mandating training for police chiefs and officers, and requiring reports the subject. *See* Act of May 31, 2009, 81st Leg., R.S., ch. 1172, § 26 (strengthening reporting

requirements); Act of May 24, 2001, 77th Leg., R.S., ch. 947, § 1 ("An Act relating to the prevention of racial profiling by certain peace officers."). This is not a history of racial discrimination. It is the opposite.

d. The legislative record does not undermine SB4's stated rationale.

The legislative record confirms that SB4 has the valid purpose apparent from its face: facilitating cooperation with federal immigration officials to promote the rule of law and reduce crime by illegal aliens. There are no "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports" stating that SB4's law-enforcement purpose is a sham. *Arlington Heights*, 429 U.S. at 268. To the contrary, the House and Senate committee reports reflect the law's manifest purpose to ban local prohibitions on cooperation with federal immigration officials.[48] Contemporaneous statements by SB4's proponents in the Legislature are in accord:

- In filing SB4, Senator Perry explained: "Banning sanctuary city policies will help prevent criminal aliens from being put back on our streets."[49]
- At the Senate State Affairs Committee hearing on SB4, Senator Perry explained that his purpose in proposing the bill was to end a "culture of contempt for the legal system" and restore "rule of law" values in Texas.[50]

[48] *See* H. Comm. on State Affairs, Bill Analysis, Tex. S.B. 4, 85th Leg., R.S., at 1 (2017) ("Concerns have been raised about the extent to which certain entities are cooperating with the federal government in the enforcement of immigration laws. C.S.S.B. 4 seeks to address these concerns and increase cooperation by, among other things, prohibiting the applicable entities from adopting or enforcing a measure under which those entities prohibit the enforcement of state or federal immigration laws or, as demonstrated by pattern or practice, the enforcement of those immigration laws."); S. Comm. on State Affairs, Bill Analysis, Tex. S.B. 4, 85th Leg., R.S., at 1 (2017) ("C.S.S.B. 4 looks to prohibit 'sanctuary city' policies, that prohibit local law enforcement from inquiring about a person's immigration status and complying with detainer requests. These policies often also prohibit the sharing of information regarding a person's immigration status with the federal government.").

[49] Press Release, Senator Charles Perry, Perry Files Legislation to Eliminate Sanctuary Cities in Texas (Nov. 15, 2016), http://www.senate.texas.gov/members/d28.press/en/p2016115.pdf.

[50] Enforcement by Certain Local Government Entities and Campus Police Departments of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the S. Comm. on State Affairs, 85th Leg., R.S., at 00:11:15-00:11:42 (Tex. Feb. 2, 2017) (statement of Sen. Charles Perry) (broadcast available online from the Senate Audio/Video Archive).

- Senator Perry further commented on the need a uniform detainer policy: "[Travis County Sherriff Hernandez] has labeled three offenses that she is willing to detain people for [at ICE's request]. Notably, what is not in those is rape, child pedophilia, and other offenses that are just as heinous and just as personal."[51]

- Senator Huffines declared that the purpose of SB4 is to target "criminal aliens," and that "Texas will not and should not ever tolerate racial profiling."[52]

- Representative Geren, the bill's sponsor in the House, introduced SB4 as about "the rule of law" and noted that local cooperation with federal officials is "not a new idea."[53]

- Representative Geren, introducing the bill at second reading on the House floor, stated that "[i]t's been [his] goal to make sure [that SB4 keeps the public safe] in a way that respects every person's rights and liberties."[54]

- Representative Villalba, explaining that his Mexican heritage did not preclude him from supporting SB4, called the bill "a common-sense bill" desired by "people in our communities who we care about who feel unsafe."[55]

- Representative Schaefer stated SB4's goal of allowing broader cooperation with immigration authorities: "the local sheriff might be arguing that [he] do[esn't] prohibit [his department from enforcing immigration laws], but in fact, [he] materially limit[s] . . . enforcement of detainers by picking some cases and not picking others. . . . [T]hat's why we're here."[56]

Lastly, plaintiffs imply that the term *illegal aliens* or *illegals* is "pejorative" or "hateful rhetoric." El Paso Mot. 19, 20. That is incorrect. As the Fifth Circuit has explained, the term "illegal alien" is properly used in law to describe individuals unlawfully present in this country. *Texas v. United States*, 809 F.3d 134, 148 n.14 (5th Cir. 2015) ("This opinion therefore refers to such persons as 'illegal aliens.'").

[51] *Id.* at 01:29:15-:30.

[52] *Id.* at 02:55:17-:22.

[53] Enforcement by Campus Police Departments and Certain Local Governmental Entities of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the H. Comm. on State Affairs, 85th Leg., R.S., at 00:13:10-00:14:06 (Tex. Mar. 15, 2017).

[54] H.J. of Tex., 85th Leg., R.S., at S1 (2017).

[55] *Id.* at S30-S31.

[56] *Id.* at S70.

e. Speculation by SB4's opponents cannot show that the law's proponents acted for the purpose of discriminating based on race.

Plaintiffs rely on statements by SB4 opponents to the effect that SB4 was "intended" as racial discrimination or "an attack on Latino" individuals. *E.g.*, ECF No. 56-5 (Sen. Rodriguez Decl.) ¶ 36. The Fifth Circuit has held that this type of speculative evidence is not probative. *See Veasey,* 830 F.3d at 234 ("the district court erred in relying on conjecture by the opponents of [a law] as to the motivations of those legislators supporting the law").

That makes good sense. "In their zeal to defeat a bill," opponents "understandably tend to overstate its reach." *Feiger v. U.S. Attorney Gen.*, 542 F.3d 1111, 1119 (6th Cir. 2008) marks omitted). Thus, "[t]he fears and doubts of the opposition are no authoritative guide." *Id.* (quotation marks omitted).

To hold otherwise only encourages gamesmanship and hyperbole by a bill's opponents. As another court has observed: "The incentive to couch partisan disputes in racial terms bleeds back into the legislative process," "as members of the 'out' party—believing they can win only in court, and only on a race-based claim—may be tempted to spice the legislative record with all manner of racialized arguments, to lay the foundation for an eventual court challenge." *Session v. Perry*, 298 F. Supp. 2d 451, 473 n.69 (E.D. Tex. 2004) (quotation marks omitted). For instance, it was known during SB4's debate that the bill's opponents were preparing for a legal challenge; hence, in response to a question about court challenges, SB4's House sponsor responded: "I would expect that a lot of what you're doing right now is trying to set one up."[57]

On the other hand, some opponents of SB4 did candidly acknowledge the bill's good-faith aims. For instance:

[57] *Id.* at S10 (statement of Rep. Charlie Geren).

- Senator Menéndez opposed SB4 but acknowledged that SB4 was "well intentioned"[58] and aimed to "creat[e] a standard approach to the law and how it is applied in the State of Texas."[59]

- Sheriff Gonzalez of Harris County opposed SB4 but testified that "[he] understand[s] [SB4] it is well intention[ed]; wanting to protect all Texans [is] admirable, [and he] appreciate[s] the work of [Representative] Geren" on SB4.[60]

- Representative Dutton spoke against SB4 on policy grounds but added that "[he doesn't] believe that [Representative Geren] is a bad person."[61]

Those concessions, notwithstanding the incentive towards loaded rhetoric, speak volumes.

f. SB4 received robust testimony and debate, and its opponents' complaints about aspects of the legislative process are not probative of anything but a desire to vote on an important bill.

Plaintiffs invoke *Arlington Heights*' statement that "[d]epartures from the normal procedural sequence also might afford evidence" that a law's stated rationale is pretext. 429 U.S. at 267. If a law is rammed through without any deliberation on its stated rationale, that might signal that another rationale is at play. But SB4 received ample process and deliberation.

For context, the Texas Legislature meets in regular sessions once every two years, and its session lasts only from January through May. SB4 was pre-filed in November 2016, before the legislative session started.[62] SB4 did not leave the Senate until February 8, 2017 and was under consideration in the House until April 27, 2017,[63] near the end of the session. Plaintiffs admit that hundreds of interested parties testified in open proceedings about SB4. El Paso Mot. 17. SB4 was

[58] Enforcement by Certain Local Government Entities and Campus Police Departments of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the S. Comm. on State Affairs, 85th Leg., R.S., at 02:56-:57 (Feb. 2, 2017) (broadcast available online from the Senate Audio/Video Archive).

[59] Sen. Floor Debate, 85th Leg., R.S., at 02:37:43-02:38:22 (Feb. 7, 2017).

[60] Enforcement by Campus Police Departments and Certain Local Governmental Entities of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the H. Comm. on State Affairs, 85th Leg., R.S., at 01:47:30-:36 (Mar. 15, 2017) (available online from the House Committee Broadcast Archive).

[61] H.J. of Tex., 85th Leg., R.S., at S29 (57th Leg. Day) (2017).

[62] Texas Legislature Online - 85(R), Actions for SB4, http://www.legis.state.tx.us/billlookup/Actions.aspx?LegSess=85R&Bill=SB4

[63] *Id.*

debated for over 16 hours in Senate committee,[64] approximately 6 hours on the Senate floor,[65] over 10 hours in House committee,[66] and over 17 hours on the House floor.[67] That is over 49 hours of recorded debate. And that does not include the countless hours that Representative Geren spent individually meeting with stakeholders and hearing their concerns and amendments during the approximately one month that the bill was in the House committee.[68] The notion that SB4 was hurried through the Legislature to avoid consideration is simply unsupportable.

Plaintiffs focus on irrelevant parliamentary procedures that show nothing more than reasonable steps to ensure a vote on an important law. Complaints like those have little weight: "Reasonable choices are to be made by the legislature not the courts." *Miss. State Chapter, Operation Push, Inc. v. Mabus*, 932 F.2d 400, 409 (5th Cir. 1991). For instance, *Operation Push* held that a complaint about a change in the votes required to pass a law merely concerned "typical aspects of the legislative process" and thus did not prove discriminatory intent. *Id.*

1. Plaintiffs point out that SB4 was declared an emergency item for legislative purposes. *E.g.*, El Paso Mot. 16. That designation concerns structuring the legislative calendar, and laws are routinely deemed emergency matters for legislative purposes in Texas (for instance, reform of the State's Child Protective Services agency was another emergency matter this session).[69] In fact, *dozens* of matters have been given the emergency designation in the Texas Legislature over the

[64] Enforcement by Certain Local Government Entities and Campus Police Departments of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the S. Comm. on State Affairs, 85th Leg., R.S. (Feb. 2, 2017).

[65] Sen. Floor Debate, 85th Leg., R.S. (Feb. 7, 2017).

[66] Enforcement by Campus Police Departments and Certain Local Governmental Entities of State and Federal Laws Governing Immigration: Hearing on S.B. 4 Before the H. Comm. on State Affairs, 85th Leg., R.S. (Mar. 15, 2017).

[67] Debate on Tex. S.B. 4 on the Floor of the Senate, 85th Leg., R.S. (Apr. 26, 2017).

[68] H.J. of Tex., 85th Leg., R.S., at S1 (statement of Rep. Charlie Geren upon initiation of House floor debate: "I have met with virtually all stakeholders impacted by this legislation, and [I am] fully aware of the many differences of opinions [on the bill].").

[69] Legislative Reference Library of Texas, *Governor's Emergency Items*, http://www.lrl.state.tx.us/whatsNew/client/index.cfm/2017/1/30/Governors-Emergency-Items..

past decade.[70] The effect of that designation is to allow the Legislature to act on the bill in the first 60 days of session,[71] meaning *more* time for legislative debate and thus hardly suggesting desire to conceal a pretextual law. SB4 went through the same process as other bills and did not pass the second chamber until April 27, on the 107th day of session.

2. The fact that SB4 spent 48 minutes in the House Calendars Committee (El Paso Mot. 17) is likewise probative of nothing. The House Calendars Committee is not a substantive committee that hears subject-matter debate over bills; rather, the Calendars Committee simply orders how bills reach the House floor. Here, a different House Committee—the State Affairs Committee—heard over 10 hours of testimony on SB4 and voted it out of Committee. The calendar is the list of bills eligible for consideration on a specified date, and the House Calendars Committee sets those calendars.[72] That a bill was considered quickly in that committee merely indicates that it was an important matter warranting attention on the House floor. It does not mean that the time for deliberating on the bill was compressed. As noted, SB4 was not rushed through the House but rather spent five weeks in the House committee.

3. Plaintiffs next raise a red herring by stating that the Senate "had . . . changed" its rule which previously required a two-thirds vote to bring a bill to the floor for debate. El Paso Mot. 17. Plaintiffs use the past tense because that rule was changed on January 21, 2015—in the *previous* legislative session, almost two years before SB4 was filed.[73] That change was not remotely related to SB4 or any specific piece of legislation. And the change was minimal: from two-thirds (66%) to three-fifths (60%) of Senators present and voting, to advance a bill to debate.[74]

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[70] Legislative Reference Library of Texas, *Governor Documents Search*, http://www.lrl.state.tx.us/legeLeaders/governors/searchProc.cfm (document type = "message"; keyword = "emergency").

[71] Legislative Reference Library of Texas, *Governor's Emergency Items*, *supra*; *see* Tex. Const. art. III, § 5(b)-(c).

[72] Texas Legislative Council, *Texas Legislative Glossary* 2 (Jan. 2017); Texas House of Representatives, Calendars Committee, http://www.house.state.tx.us/committees/committee/?committee=C050.

[73] S. Journal, 84th Leg. R.S., Jan. 21, 2015, p. 7-8 (amending Senate Rule 5.13).

[74] *Id.*

4. Plaintiffs assert that the House departed from its usual legislative process in attempting to enact a "calendar rule" for the consideration of amendments, and in subsequently reconsidering the vote for that rule when the original vote failed. El Paso Mot. 17-18. That is false.

The House routinely enacts calendar rules to require that proposed amendments for major pieces of legislation (e.g., budget, emergency items, school finance, sunset legislation) be pre-filed by a certain time.[75] The purpose is to enable a more thorough debate by allowing members to review proposed amendments in advance. Here, those opposed to SB4 voted against the calendar rule that they are now complaining was not adopted.[76] It is also false to suggest that the reconsideration of the original vote to adopt the calendar rule was a departure from the norm because "the outcome was not in doubt." El Paso Mot. 18. To the contrary, because the House has a two-thirds rule for adopting a calendar rule,[77] the original 90-52 vote for the calendar rule was just five votes short of the needed two-third vote (i.e., 95 ayes).[78] That close margin gave sufficient doubt to reconsider the vote, and indeed the margin shrank on reconsideration to just two votes below the threshold.[79]

5. Plaintiffs complain about the House process for considering amendments. El Paso Mot. 18-19. But the parliamentary step they complain about was actually a courtesy to opponents of SB4. The routine course when opponents continue offering amendments to delay an up-or-down vote on a bill is for proponents to simply move the previous question, which forecloses any vote on the pending amendments themselves.[80] Here, the House gave SB4 opponents the courtesy of an alternative parliamentary procedure that allowed them to say that their amendment was at least voted down (using the margin of the vote the last debated amendment, Record Vote 456), rather

[75] Rules of the Texas House of Representatives, 85th Legislature; e.g., Rules of the Texas House of Representatives, 85th Legislature, Rule 11, § 6(g) and (h).

[76] See, e.g., H. Journal, 85th Leg., R.S., April 24, 2017, p. 5 (record vote 363).

[77] Rules of the Texas House of Representatives, 85th Leg., Rule 6, § 16(f).

[78] H. Journal, 85th Leg., R.S., April 24, 2017, p. 5 (record vote 363).

[79] H. Journal, 85th Leg., R.S., April 24, 2017, p. 10 (record vote 365).

[80] Rules of the Texas House of Representatives, 85th Leg., Rule 7, § 21.

than not considered at all (the perfectly acceptable routine course). Either way, the House was going to move to a *vote* on the long-debated bill without those amendments, so this picayune choice of procedure cannot possibly prove intent to cover up some suppressed rationale for SB4.

6. Plaintiffs rely on the fact that some amendments proposed by SB4's opponents were not accepted. *See id.* at 18-19. At the outset, this portion of plaintiffs' theory is infirm because a "failure to enact suggested amendments . . . are not the most reliable indications of [legislative] intention." *Bryant v. Yellen*, 447 U.S. 352, 376 (1980). In any event, focusing on the fate of opponents' amendments only highlights that several were adopted: Amendment No. 21, offered by Senator Garcia on behalf of Senator Rodríguez, was adopted with no objections and added an exemption for public health departments of a local entity.[81] Amendment No. 25, offered by Senator Uresti, was adopted with no objection and added "religion" to the anti-discrimination provision.[82] And the House passed eight ameliorative amendments proposed by Democrat lawmakers.[83] Adopting some of opponents' amendments while declining to adopt others incompatible with the majority's policy choices is a routine part of the legislative give-and-take.

7. Finally, plaintiffs argue that the amendment proposed during the House debate by Representative Schaeffer "should have been considered a substantial substitute and, thus, should have been pre-filed." El Paso Mot. 20. But the Schaefer amendment was filed in the same manner and form as all other amendments proposed in the House. And the Schaeffer amendment was not "a complete substitute" for the pending bill.[84] It merely restored language from the Senate passed version to one part of the bill.[85] That happens all the time and is arguably more transparent than doing the same thing during the conference committee process, where it can also occur.

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[81] S.J., 85th Leg., R.S. 219, at 224.

[82] *Id.* at 224.

[83] *Id.* at 1859, 1876, 1879, 1882, 1884, 1896, 1914, 1918, 1921 (Amends. 7, 20, 23, 26, 28, 40, 60, 64).

[84] Rules of the Texas House of Representatives, 85th Leg., Rule 11, § 6.

[85] *See* pages 6 and 9, http://www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=85R&Bill=SB4.

8. In sum, plaintiffs' arguments about parliamentary procedure miss the forest for the trees. The inquiry into procedural deviations is trying to analyze whether there was an eagerness to rush legislation through for the purpose of limiting the opportunity for debate and review. The exact opposite happened here. SB4 went through the ordinary committee process in both chambers. No provisions were added to the bill outside the normal legislative process. SB4 was heard over the course of 10-plus hours in House committee on March 15, 2017. Not one amendment was offered by those opposing the bill in the House committee, despite the lengthy testimony. For the next 42 days, committee chair Representative Geren listened to concerns and comments from law-makers, law-enforcement officials, and other stakeholders.[86] As a result of that process, the bill was modified into a committee substitute that was voted out of committee.[87] This is not an aberrational departure from conventional process. This is how the legislative process functions. Nothing about the way in which SB4 was considered and passed suggests an ulterior, invidious motive in its adoption.

The principle of parsimony supports the conclusion that the Texas Legislature was not operating with a discriminatory purpose: "In the law, as in life, the simplest explanation is sometimes the best one." *Loan Syndications & Trading Ass'n v. S.E.C.*, 818 F.3d 716, 718 (D.C. Cir. 2016); *Brown v. Vance*, 637 F.2d 272, 281 (5th Cir. 1981) (applying Occam's Razor to pick between competing theories). So it is here. SB4's purpose is what the Legislature stated and what the law does: to promote cooperation with federal immigration officials in the interest of public safety and the rule of law. The circumstantial evidence confirms that SB4's neutral classifications are not pretext for a classification according to race.

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[86] *See* House Comm. Recording, at 00:01:44-00:01:48, 00:12:55-00:18:00 (showing that Representative Geren worked with a number of parties after the bill was heard in committee to make changes to the bill that resulted in the committee substitute).

[87] The Senate engrossed version and House Committee substitute are compared side-by-side at pages 4-18 of the House Committee Bill Analysis on SB4, 85th Leg., R.S. (2017).

C. The San Antonio plaintiffs' claim of purposeful discrimination on account of alien status is unsustainable.

The El Cenizo and San Antonio plaintiffs also argue that SB4 violates equal-protection rights by singling out and regulating with respect to the alleged "suspect class" of non-citizens. El Cenizo Mot. 38; San Antonio Mot. 40. That is mistaken. State laws are not categorically suspect for regulating on the topic of immigration law. The Supreme Court has repeatedly upheld state laws on this subject and emphasized their usefulness. *Arizona*, 567 U.S. at 411; *Whiting*, 563 U.S. at 600-01. Plaintiffs cite no case suggesting that aliens are a suspect class with respect to federal immigration laws, subjecting those laws to strict scrutiny. Indeed, a defining characteristic of immigration law is distinguishing between citizens and aliens. And SB4 simply turns on the federal government's permissible classifications.

Moreover, if plaintiffs mean to argue that SB4 regulates a narrower class—unlawfully present aliens, who would be subject to immigration law enforcement—the equal-protection argument still fails. Unlawfully present aliens subject to federal immigration consequences are not a suspect class, even outside the immigration context. *See, e.g.*, *LeClerc v. Webb*, 419 F.3d 405, 415 (5th Cir. 2005) ("To begin, nonimmigrant aliens are not a suspect class under *Griffiths*."); *id.* at 416 ("The Court has never applied strict scrutiny review to a state law affecting any other alienage classifications, *e.g.*, illegal aliens, the children of illegal aliens, or nonimmigrant aliens."); *id.* at 419-20 ("there is no precedential basis for the proposition that nonimmigrant aliens are a quasi-suspect class or that state laws affecting them are subject to intermediate scrutiny").

VIII. Plaintiffs' Voting-Rights Arguments Are Unfounded.

Plaintiffs argue that SB4 violates the Fourteenth Amendment right to vote (El Cenizo Mot. 38-39) or § 2 of the Voting Rights Act (San Antonio Mot. 43-44). That argument is baseless.

SB4 has nothing to do with voting. The El Cenizo plaintiffs invoke (Mot. 38) the Supreme Court's recognition of "a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). Similarly, the San Antonio plaintiffs rely (Mot. 42) on the limits in Voting Rights Act § 2 on a "voting

qualification or prerequisite to voting or standard, practice, or procedure." 52 U.S.C. § 10301. But plaintiffs cite nothing in SB4 stating a "voting qualification" or prerequisite, *id.*, or "regulat[ing] access to the franchise," *Dunn*, 405 U.S. at 336. Because SB4 is not a voting regulation, neither the Fourteenth Amendment right to vote nor § 2 of the Voting Rights Act applies.

Plaintiffs reason that removing an official for specified misconduct—as SB4 provides for—somehow "revokes" (El Cenizo Mot. 39) or "dilutes" (San Antonio Mot. 42) citizens' right to vote on an equal basis. Plaintiffs fail to cite a single case for this non sequitur. State laws provide for removing officials for any number of reasons, from corruption to neglect of duties to failing to take state-required training on racial profiling. *E.g.*, Tex. Const. art. V, § 24; *id.* art XV, § 7; Tex. Loc. Gov't Code §§ 22.009, 87.013; Tex. Gov't Code § 406.018; Tex. Spec. Dist. Code § 5004.058; Tex. Educ. Code § 96.641(i), (k). Removing an official for a violation of state law does not dilute the *voting* strength of any group of voters. If plaintiffs have a dispute with the procedures for how removed officials are replaced, the appropriate object of such an as-applied challenge is the particular replacement process. The San Antonio plaintiffs seem to recognize this, citing the city charter provisions governing replacement of removed officials. San Antonio Mot. 43. But those replacement provisions are not what plaintiffs challenge or seek to enjoin here.

IX. Plaintiffs' Tenth Amendment Argument Is Meritless.

Plaintiffs argue that SB4 violates the Tenth Amendment anti-commandeering doctrine. El Cenizo Mot. 39-40. That claim is baseless. The anti-commandeering doctrine protects state officials from *federal* control, not local officials from state control.

The Tenth Amendment anti-commandeering doctrine respects the division of powers between "the State and Federal Governments" by imposing limits on "federal control" of state officers. *Printz*, 521 U.S. at 922; *accord New York*, 505 U.S. at 188.

That doctrine does not apply here for a basic reason: SB4 is a *state law*, not a federal law. The Tenth Amendment addresses "the proper division of authority between the Federal Government and the States." *New York*, 505 U.S. at 149. It has nothing to say about how a State controls

its state and local officials. *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

Unsurprisingly, then, plaintiffs cannot cite a single case invalidating a *state* law under the Tenth Amendment. *See* El Cenizo Mot. 39-40 (citing *Printz* and *New York*, which were both challenges to federal laws, and *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012), which was not an anti-commandeering case at all). If the States in *Printz* and *New York* had directed statewide compliance with the federal regulatory programs at issue, there would be no anti-commandeering problem.

Plaintiffs note (El Cenizo Mot. 39) that local entities can be proper Tenth Amendment *claimants* if they are "agents of the State" whose state-issued power is being *federally* commandeered. *Printz*, 521 U.S. at 930, 931 n.15. But the identity of a proper state-government *claimant* does not change the proper *object* of an anti-commandeering challenge: a "federal regulatory program." *Id.* at 930.

In any event, plaintiffs would not even be proper state-government claimants. Through SB4, the State has withdrawn local entities' state-law authority to categorically refuse cooperation with immigration law enforcement and has directed compliance with the State's duly enacted policy. Plaintiffs raise no state-law challenge to the withdrawal of their authority in this regard. And the Supreme Court has long recognized that "[t]he number, nature, and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." *Hunter*, 207 U.S. at 178; *see supra* pp. 16-17.

X. Plaintiffs' Contract Clause Claim Is Meritless.

The City of San Antonio claims that SB4 impairs "contracts" between public institutions of higher education and their students and employees. San Antonio Mot. 48-51. But SB4 does not

violate the Contract Clause. U.S. Const. art. I, § 10, cl. 1.[88] SB4 does not in any way impair constitutionally protected contractual obligations. San Antonio's argument borders on frivolous.

As an initial matter, the City of San Antonio and its officials lack standing to raise this claim. "Being but creatures of the State, municipal corporations have no standing to invoke the contract clause . . . of the Constitution in opposition to the will of their creator." *Coleman v. Miller*, 307 U.S. 433, 441 (1939); *Donelon v. La. Div. of Admin. Law ex rel Wise*, 522 F.3d 564, 567 n.6 (5th Cir. 2008) (noting, separate and apart from other possible constitutional claims, the "general rule that political subdivisions have no standing to invoke the Contract Clause or the Fourteenth Amendment in opposition to the will of their creator").[89]

In any event, and in spite of the City's "heavy burden" to show a Contract Clause violation "in the context of a facial challenge," *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 992 (2d Cir. 1997), the City points to no authority for its argument that there exists an implied contract between colleges and students that is capable of being impaired by State law. *See* San Antonio Mot. 49-50. The City also makes no effort to explain just how the various features it identifies as part of this implied contract—"admission," "tuition," a "pertinent curriculum," "standards and guidelines for academic achievement, community citizenship, and general behavior," students "earn[ing] degrees" (*id.* at 49-50)—would be impaired by SB4. It cannot be merely that "students will be deterred from attending school and completing their degrees." *Id.* at 49. By that logic, if the Texas legislature were to pass a revenue-raising law that increased tuition fees, or were to raise the drinking age, and as a result Texas public universities and junior colleges became

[88] The City's Contract Clause claim regarding implied obligations between public institutions and their employees is premised entirely on its overbroad definition of "endorsement." San Antonio Mot. 51. That should be rejected for the reasons discussed in Section IV, *supra*.

[89] Furthermore, the City's assertion of its Contracts Clause relies upon affidavits from municipal officials (San Antonio Police Chief McManus and Alamo Colleges District Board Member Alderete). San Antonio Mot. 49-50. Junior colleges are governmental units organized under Tex. Educ. Code § 130 through a "Junior College District," and are political subdivisions of the State, *id.* at §§ 130.001-.211; *see also* Tex. Civ. Prac. & Rem. Code § 101.001(3)(A)-(B) (defining "[g]overnmental unit" as "this state and all the several agencies of government that collectively constitute the government of this state" and as "a political subdivision of this state, including any . . . junior college district.").

less attractive to students, there could be a viable Contract Clause claim. The City's broad conception of this impairable implied student-college contract, untethered to the case law, "would expand the definition of contract so far that the Contract Clause would lose its purpose." *General Motors Corp. v. Romein*, 503 U.S. 181, 182 (1992). In effect, it "would cause the Clause to protect against all changes in legislation." *Id.* The Contract Clause was never intended "to obliterate the police power of the States." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).

But even assuming that a constitutionally protected contract could be fashioned from these amorphous standards, SB4 does not effect a "substantial impairment." *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 504 (5th Cir. 2001). The City's claimed impairment rests entirely on its assumption that SB4 will "inevitably lead to racial profiling" with resulting burdens for Latino students. San Antonio Mot. 50. Any claim that SB4 will result in racial profiling or discriminatory treatment is entirely speculative at this facial-challenge stage. *See supra* p. 63. SB4 itself bans unconstitutional racial discrimination. *See* SB4 § 1.01 (§ 752.054). And that complements already existing State law, which requires law-enforcement agencies to adopt policies that "strictly prohibit[s] peace officers employed by the agency from engaging in racial profiling," Tex. Code Crim. Proc. art. 2.132, and, among other things, undergo training on racial profiling, Tex. Educ. Code § 96.641(a)-(d), (k). If any future enforcement activity by federal, local, or campus police officers is alleged to discriminate against Latino students based on race, that can be challenged and declared unlawful. *E.g.*, *Batson*, 476 U.S. at 83-84; *Arlington Heights*, 429 U.S. at 269. *See supra* pp. 65-66.

Moreover, when analyzing the extent of impairment, courts frequently take into account the degree to which "the industry the complaining party has entered has been regulated in the past." *Energy Reserves Grp, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983). It should come as no surprise that public institutions of higher education are "heavily regulated" by the State. *Id.* at 413. Education is, after all, an important component of the State's police power. *See, e.g.*, *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1518 n.7 (5th Cir. 1993) (discussing Texas law, and refer-

ring to the "valid exercise of the state's police power in regulating education"). The Texas Education Code alone is replete with provisions regulating every aspect of public universities. *See, e.g.*, Tex. Educ. Code chs. 53-135. Just for public junior colleges, there are 254 sections, many of which have dozens of subsections. *Id.* ch. 130. And this significant regulation extends to campus peace officers. The Code is what authorizes their employment. *See id.* at § 51.203. It vests those officers with "powers, privileges, and immunities," including the power to make arrests. *Id.* § 51.203(b)(1)-(2). And it subjects them to State certification requirements. *Id* § 51.203(e).

All this it to say that the students, colleges, and university employees involved in San Antonio's alleged "implied contract" were on notice that the rights and responsibilities under that "contract" were subject to changes by the State. *Cf. Energy Reserves*, 459 U.S. at 411 ("When he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic."); *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the [S]tate by making a contract about them."). "A state cannot 'bargain away' its police power." *United Healthcare Ins. Co. v. Davis*, 602 F.3d 618, 627 n.7 (5th Cir. 2010). Any "contract" now existing between colleges and their students—or between colleges and their employees, for that matter—could not have "surrender[ed] an essential attribute of the State's sovereignty." *Lipscomb*, 269 F.3d at 505 (internal quotations and brackets omitted).

Finally, even if San Antonio could show substantial impairment, SB4 serves a "significant and legitimate public purpose," and any incidental effect on implied contracts is "reasonable." *Energy Reserves*, 459 U.S. at 411. The City's argument to the contrary is merely a rehash of its federal preemption argument. *See* San Antonio Mot. 50. SB4 is not preempted legislation. *See supra* Part II. As evidenced in the bill's text and in its legislative history, SB4 is designed to facilitate cooperation with federal immigration officials to promote the rule of law and reduce crime committed by aliens. *See* SB4; *supra* pp. 76-77. That is a legitimate exercise of the State's police power. It has long been recognized that States possess the sovereign power to pass "[l]egislation to protect the public safety" *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 436 (1934); *see*

also id. ("[T]he reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."). This power is not merely significant and legitimate; it is "paramount." *Allied Structural Steel Co.*, 438 U.S. at 241.

XI. The Texas Constitution Home Rule Amendment Does Not Bar SB4's Enforcement.

A. The City of Austin claims that, as a home-rule city endowed with certain powers of self-government under State law, *see* Tex. Const. art. XI, § 5, it has "police power authority" upon which SB4 cannot infringe. Austin Mot. 18.[90] But the very same constitutional provision the city cites makes clear that these local self-government powers are necessarily limited by, and subordinate to, laws enacted by the State. *See* Tex. Const. art. XI, § 5 ("The adoption or amendment of charters is subject to such limitations as may be prescribed by the Legislature, and no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State."). The power of self-government is not absolute. The Texas Constitution did not establish various independent fiefdoms, unaccountable to the Legislature and the laws it passes. As the Texas Supreme Court has made clear, any city "that attempts to regulate a subject matter preempted by a state statute is unenforceable to the extent it conflicts with the state statute." *Dallas Merchant's*, 852 S.W.2d at 491.

Texas had ample power under state law to pass SB4. *Contra* Austin Mot. 19. The Texas Legislature has the general power to pass legislation "reasonably related to public health and welfare" as a "valid exercise of the police power." *Gibson Distrib, Inc. v. Downtown Develop. Ass'n of El Paso, Inc.*, 572 S.W.2d 334, 335 (Tex. 1978). The State's police power is "broad and comprehensive." *Tex. State Teachers Ass'n v. Texas*, 711 S.W.2d 421, 425 (Tex. App. 1986). And the

[90] Cities with populations over 5,000 may elect to become home-rule cities. Tex. Const. art. XI, § 5. Unlike other cities, "[a] home rule city derives its power not from the Legislature but from [the] Texas Constitution." *Lower Colo. River Auth. v. City of San Marcos*, 523 S.W.2d 641, 643 (Tex. 1975). Although a home-rule city "has all the powers of the state not inconsistent with the Constitution, the general laws, or the city's charter[,] these broad powers may be limited by statute." *Proctor v. Andrews*, 972 S.W.2d 729, 733 (Tex. 1998).

"promotion of safety" has long been understood to be "unquestionably at the core" of that power. *Kelly*, 425 U.S. at 247; *accord Lombardo v. City of Dallas*, 73 S.W.2d 475, 479 (Tex. 1934) (holding that the State's police power "embraces regulations designed to promote . . . public safety").

Whatever disagreements the City of Austin might have with Texas's chosen methods, it cannot seriously be contested that SB4 is reasonably related to safeguarding the public. *See supra* pp.76-77.[91] In the lead-up to SB4, between June 1, 2011 and November 30, 2015, "over 176,000 criminal aliens (those that are unlawfully present in the United States and have committed an additional crime for which they were arrested) [were] booked into local Texas jails." Senate Veterans Affairs and Military Installations Subcommittee on Border Security, Interim Report to the 85th Legislature, at 1, http://www.senate.state.tx.us/cmtes/84/c652/c652.InterimReport2016.pdf. And that figure has only continued to expand. "[O]ver 222,000 criminal aliens have been booked into local Texas jails between June 1, 2011 and May 31, 2017." Tex. Dep't of Pub. Safety, Texas Criminal Alien Arrest Data, https://www.dps.texas.gov/administration/crime_records/pages/txCriminalAlienStatistics.htm. In those six years, criminal aliens were responsible for over 593,000 criminal offenses—including 1,211 homicide charges, 70,500 assault charges, 17,132 burglary charges, 8,906 weapons charges, and 6,361 sexual assault charges. *Id.* And "[o]f the convictions associated with criminal alien arrests, over 177,000 or 66% are associated with aliens who were identified by [Department of Homeland Security] status as being in the US illegally at the time of their last arrest." *Id.* SB4 was intended to combat this significant criminal problem by stopping localities like the city from impeding cooperation with federal immigration officials.

B. El Paso County similarly argues, in passing, that SB4 unconstitutionally interferes with the "El Paso County Sheriff's constitutional duty as the county's final policymaker in the area of

[91] *See also, e.g.*, Press Release, Sen. Charles Perry, Perry to Address Sanctuary Campuses in Senate Bill 4 (Dec. 5, 2015), http://www.perry.senate.state.tx.us/pr16/p120516a.htm ("[T]his bill is about keeping our schools and communities safe); Gov. Greg Abbott, State of the State Address (Jan. 31, 2017), https://gov.texas.gov/news/post/governor_abbott_delivers_state_of_the_state_address (recounting the serially violent criminal exploits of an alien in and out of Texas jails).

law enforcement" and the "El Paso County Attorney's prosecutorial function." El Paso Mot. 4 n.2. The County makes no effort to identify what powers have been conferred on these local officials to give them final authority over what laws to enforce or prosecute, the source of such sweeping powers, or just how it is that SB4 would interfere with the exercise of those powers should they exist. *See* El Paso Mot. 4 n.2.[92]

In actuality, the Texas Constitution makes it clear that county sheriffs are subordinate to the State. Tex. Const. art. V, § 23 ("There shall be elected by the qualified voters of each county a Sheriff, who shall hold his office for the term of four years, whose duties, qualifications, perquisites, and fees of office, shall be prescribed by the Legislature."); *see also Neff v. Elgin*, 270 S.W. 873, 877 (Tex. Civ. App. 1925) ("the sheriff's duties are defined by the Legislature"). And county attorneys have a constitutional duty to represent the State. Tex. Const. art. V, § 21 ("The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties."); *accord Upton v. City of San Angelo*, 94 S.W. 436, 437 (Tex. Civ. App. 1906). Nothing in the Texas Constitution gives these local officials veto-power over laws enacted by the Legislature.

XII. Plaintiffs Do Not Make the Equitable Showing for a Preliminary Injunction.

To obtain the extraordinary relief of a preliminary injunction, a plaintiff must show not only a likelihood of success on the merits but "that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. 7, 20 (2008). Plaintiffs do not make those showings.

Plaintiffs must first show that irreparable injury is likely absent an injunction: "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a

[92] The county's reliance on *Hill County. v. Sheppard*, 178 S.W.2d 261, 264 (Tex. 1944)—the only case it cites in support of its argument—is perplexing. That case concerned the Legislature's attempt effectively to abolish the office of county attorney, which the court held that the Legislature was without authority to do because that office was provided for in the Constitution. *Id.* at 262-64 (discussing Tex. Const. art. V, § 21). Surely, El Paso County cannot be arguing that SB4 does anything remotely similar.

clear showing that the plaintiff is entitled to such relief." *Id.* at 22. Here, plaintiffs are seeking to enjoin a law that does not order a new type of activity with unknown effects. Rather, state and local law-enforcement officials have been cooperating with federal immigration authorities across the nation for years, without irreparable harm to those officials. *E.g.*, Waybourn Decl. ¶¶ 6-10; Decl. of Steven McCraw (Exh. 3) ¶ 6-10. This counsels against the extraordinary remedy of injunctive relief. *Winter*, 555 U.S. at 23. Also, SB4 requires defense and indemnification of any liability of covered law-enforcement officials for complying with detainer requests, further undermining claims that plaintiffs will be irreparably harmed once SB4 takes effect. SB4 § 3.01.

In any event, any alleged harm to plaintiffs is outweighed by the ongoing irreparable harm to the State from an injunction and by the public interest. "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (brackets omitted) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). It is for the State to judge the public-safety interests coloring a decision on cooperation with federal officials, and preventing the State from implementing a statute addressing "law enforcement and public safety interests . . . constitutes irreparable harm." *Id.*

An injunction would also be contrary to the public interest. SB4 furthers the same public interest enshrined federally in 8 U.S.C. §§ 1373 and 1644: facilitating cooperation between law enforcement and federal immigration officials. *See generally* 8 U.S.C. §§ 1373, 1644 (encouraging local communication with federal immigration authorities regarding unauthorized immigrants). Promoting the rule of federal and state law—not refusing to cooperate in it, as plaintiffs wish—is a compelling public interest. *See Heckler v. Cmtty Health Servs. of Crawford Cty, Inc.*, 467 U.S. 51, 60 (1984) ("noting the interest of the citizenry as a whole in obedience to the rule of law"). Moreover, the public has an interest in allowing SB4 to proceed to take effect September 1, 2017, rather than whenever so that, in advance of the law's effective date, local officials can begin community outreach envisioned by SB4, educating the public of local policies on immigration-status inquiries. *See* SB4 § 1.01 (§752.057).

STATEMENT REGARDING EVIDENCE

Defendants do not believe evidence is necessary or relevant to the facial, pre-enforcement challenges that plaintiffs have mounted. To the extent the court allows evidence anyway, defendants attach and incorporate the following exhibits in support of its response:

Exhibit 1: Declaration of Steven C. McCraw

Exhibit 2: Declaration of Bill E. Waybourn

Exhibit 3: Declaration of Rand Henderson

Exhibit 4: Declaration of Laura Stowe

CONCLUSION

For the foregoing reasons, the Court should deny the motions for a preliminary injunction.

Respectfully submitted this the 23d day of June, 2017.

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CERTIFICATE OF SERVICE

I, Darren McCarty, hereby certify that on this the 23rd day of June, 2017, a true and correct copy of the foregoing document was transmitted using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/Darren McCarty
Darren McCarty